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1958

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and on Appeal therefrom in the

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The Court of Criminal Appeal

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Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

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1925

Administration of Estates Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 23), *ss.* 2 (2), 55 **Ashworth J. 404**

Criminal Justice Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 86), *s.* 14 (2) - - **C.C.A. 250**

Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 29 - - - **C.A. 107**

—— —— *s.* 146 - - - - **C.A. 332**

—— —— —— - - **Ashworth J. 404**

1930

Land Drainage Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 44), *ss.* 34 (1) (3), 38 (1), 81 **C.A. 143**

Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *ss.* 11 (1), 49 (*b*) - **Divl.Ct. 277**

1933

Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3, *Sch. I* - **C.A. 117**

—— —— *s.* 16 - - - - **C.A. 530**

—— —— *Sch. I, para.* (*h*) - - **C.A. 107**

—— —— *Sch. I, para.* (*h*), *proviso* **C.A. 439**

1934

County Courts Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 105 - - - **C.A. 12**

—— —— *s.* 164 (3) - - - **C.A. 288**

1936

Housing Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *s.* 85 (6) - - - **C.A. 461**

Public Health Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *ss.* 103, 106 - **Divl.Ct. 50**

1938

Administration of Justice (Miscellaneous Provisions) Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 63), *s.* 11 (3) - - **C.C.A. 250**

Leasehold Property (Repairs) Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 34), *s.* 1 - - **C.A. 332**

1939

Limitation Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *ss.* 4 (3), 5 (1), 10 (1) - **C.A. 159**

Rent and Mortgage Interest Restrictions Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3 (1) *and* (3) - - - - **C.A. 530**

1946

National Health Service Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 81) - - **Divl.Ct. 50**

1947

Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 14, 15, 17, 26, 27 - - - - - **C.A. 554**

—— —— *ss.* 23 (1) (2) (4), 24 (1) (3) **C.A. 478**

1950

Adoption Act, 1950 (14 *Geo.* 6, *c.* 26), *ss.* 2 (4), 3 (1) (*a*) - - - - **C.A. 12**

1953

Licensing Act, 1953 (1 & 2 *Eliz.* 2, *c.* 46), *ss.* 22, 25 - - - **Divl.Ct. 36**

1954

Landlord and Tenant Act, 1954 (2 & 3 *Eliz.* 2, *c.* 56), *Part II*, *s.* 23 (2) - **C.A. 513**

1955

Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*) - - - - **C.A. 298**

1957

Homicide Act, 1957 (5 & 6 *Eliz.* 2, *c.* 11), *s.* 2 **C.C.A. 270**

—— —— *s.* 2 (1) (2) - - - **C.C.A. 1**

Rent Act, 1957 (5 & 6 *Eliz.* 2, *c.* 25), *ss.* 1, 2, *Sch. I*, *paras.* (1), (2) *and* (3) **C.A. 346**

—— —— *s.* 11 (1), *Sch.* 5, *paras.* 1 (*b*), 2 (1) **C.A. 425**

Rent Act, 1957 (5 & 6 *Eliz.* 2, *c.* 25), *Sch.* 6, *para.* 21 - - - - **C.A. 439**

STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

Adoption of Children (County Court) Rules, 1952 (*S.I.* 1952, *No.* 1258), *r.* 9 **C.A. 12**

Aliens Order, 1953 (*S.I.* 1953, *No.* 1671), *art.* 2 (1) (*b*) (2) - - **Barry J. 496**

R.S.C., *Ord.* 22, *r.* 1 (2) - **Donovan J. 432**

R.S.C., *Ord.* 58, *r.* 3 - - - **C.A. 12**

—— *Ord.* 65, *r.* 1 - - - **C.A. 323**

Town and Country Planning General Development Order, 1950 (*S.I.* 1950, *No.* 728), *arts.* 3 (1), 4 (1), *Sch. I*, *Class XII* **C.A. 554**

ERRATUM

[1958] 1 Q.B. 176. *Payne* v. *Cooper*. For "*Roy Dunn*" read "*Robin* "*Dunn*." For "*Back*" read "*Patrick Back*."

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM
OR FROM COUNTY COURTS

AND BY THE

COURT OF CRIMINAL APPEAL

REGINA *v.* DUNBAR.

C. C. A.

1957
June 24;
July 1, 5.

Lord Goddard C.J., Byrne and Devlin JJ.

Criminal Law — Murder — Diminished responsibility—Onus of proof—Balance of probabilities—Homicide Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 11), *s.* 2 (1) (2).
Burden of Proof.

Where a plea of diminished responsibility within the terms of section 2 (1) of the Homicide Act, 1957,[1] is put forward as a defence to a charge of murder the jury should be directed that the

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[1] Homicide Act, 1957, s. 2: "(1) Where a person kills . . . "another, he shall not be convicted "of murder if he was suffering from "such abnormality of mind (whether "arising from a condition of arrested "or retarded development of mind or "any inherent causes or induced by "disease or injury) as substantially "impaired his mental responsibility "for his acts and omissions in doing "or being a party to the killing.

"(2) On a charge of murder, it "shall be for the defence to prove "that the person charged is by virtue "of this section not liable to be con- "victed of murder.

"(3) A person who but for this "section would be liable, whether as "principal or as accessory, to be "convicted of murder shall be liable "instead to be convicted of man- "slaughter."

1953

Licensing Act, 1953 (1 & 2 *Eliz.* 2, *c.* 46), *ss.* 22, 25 - - - **Divl.Ct. 36**

1954

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Criminal Law — Murder — Diminished responsibility—Onus of proof—Balance of probabilities—Homicide Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 11), *s.* 2 (1) (2).

Burden of Proof.

Where a plea of diminished responsibility within the terms of section 2 (1) of the Homicide Act, 1957,[1] is put forward as a defence to a charge of murder the jury should be directed that the burden of proof on the defence under section 2 (2) of the Act, which provides that "it shall be for the defence to prove that the person "charged is by virtue of this section not liable to be convicted of "murder" is not as heavy as the burden which rests on the prosecution to prove its case beyond reasonable doubt, and that the burden on the defence is discharged if the evidence justifies the conclusion that the balance of probabilities is in favour of the defence.

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[1] Homicide Act, 1957, s. 2: "(1) Where a person kills . . . "another, he shall not be convicted "of murder if he was suffering from "such abnormality of mind (whether "arising from a condition of arrested "or retarded development of mind or "any inherent causes or induced by "disease or injury) as substantially "impaired his mental responsibility "for his acts and omissions in doing "or being a party to the killing.

"(2) On a charge of murder, it "shall be for the defence to prove "that the person charged is by virtue "of this section not liable to be con-"victed of murder.

"(3) A person who but for this "section would be liable, whether as "principal or as accessory, to be "convicted of murder shall be liable "instead to be convicted of man-"slaughter."

Rex v. *Carr-Briant* [1943] K.B. 607; 59 T.L.R. 300; [1943] 2 All E.R. 156, and *H.M. Advocate* v. *Braithwaite,* 1945 S.C.(J.) 55 applied.

APPEAL against conviction.

The appellant, Ronald Patrick Dunbar, was charged before Ashworth J. at Newcastle-upon-Tyne Assizes on May 16, 1957, with capital murder under section 5 (1) (*a*) of the Homicide Act, 1957, in that on or about March 5, 1957, he murdered Selina Mewes in the course or furtherance of theft. The facts, which were not disputed, were that the appellant, a young man of 24 years of age, on the night in question broke into the house occupied by Selina Mewes, who was 82 years of age and very deaf. He did so after discussion with a friend, one Curry, with whom he had been spending the evening, but who did not accompany him on his criminal enterprise. The appellant had, some few nights previously, broken into the house and stolen a sum of money. From a statement made by the appellant to the police the following day it appeared that on the night in question he got into the house by breaking a window. He then forced the door of the back room, which was locked, and the door of the front room, which was also locked and in which Selina Mewes was sleeping. While the appellant was searching for money in her room she woke up and the appellant, thinking that she had recognized him, picked up a lemonade bottle and attacked her with it, striking her on the head several times and causing serious injuries from which she died. The medical evidence showed that the skull was smashed and the cheekbones broken. The appellant then took a number of 10s. notes which he found in the room and ran away. The following day he gave himself up to the police. At the trial there was no dispute that the appellant was responsible for the killing or that it was done in the course of theft. The only defence raised on his behalf was that he was at the time of the crime suffering from diminished responsibility under the terms of section 2 (1) of the Homicide Act, 1957. Accordingly, it was suggested by the defence that the right verdict would be one of manslaughter, that being the appropriate verdict for giving effect to the doctrine of diminished responsibility in accordance with section 2 (3) of the Act. The issue was left to the jury who found the appellant guilty of capital murder. He was sentenced to death.

He appealed on the ground, inter alia, that the judge failed to direct the jury properly, or misdirected them, on the onus or standard of proof required of the defence on the issue of diminished responsibility, in particular, that at the beginning of his summing-up he equated the onus or standard of proof required of the defence with that required of the prosecution, and directed the jury that before giving effect to the "special "defence" they must be "satisfied" and if not satisfied must reject it.

P. Stanley Price Q.C. and *J. R. Johnson* for the appellant. At the trial there was no dispute that the accused was responsible for killing the woman concerned, or that the crime was committed in the course of theft. The sole defence put forward was that the appellant was suffering from diminished responsibility within the meaning of section 2 (1) of the Homicide Act, 1957, and accordingly it was submitted that the right verdict would be one of manslaughter. Accordingly, the submission in this court is, not that the conviction should be quashed altogether but that it would be right for the court to substitute a verdict of manslaughter for that of murder, thus giving effect to the doctrine of diminished responsibility and rendering the appellant liable to imprisonment and not to death.

The jury was clearly not directed by Ashworth J. on the question of the onus of proof on the defence in the manner and to the effect which this court has said should be the proper direction. When the onus of proof in respect of any matter is placed on the defence in the way it is by section 2 (2) of the Act of 1957—"it shall be for the defence to prove"—the burden which the defence incurs is less than that which is required at the hands of the prosecution in proving its case beyond reasonable doubt; it can be discharged by evidence which satisfies the jury of the probability of that which the defence has to make out. In other words, the burden is equivalent to that which a party in a civil proceeding undertakes to discharge—whether or not it has been so discharged has to be decided on the balance of probabilities.

[LORD GODDARD C.J. The whole law on this subject is discussed in *Rex* v. *Carr-Briant.*[2] That case was not cited to the judge.]

The case was not itself cited but the principle was referred to. The submission made by the defence in the final speech to the jury was that the standard of proof required of the defence was less exacting than that required of the prosecution, and they were asked to come to a conclusion on whether the defence had been made out on the balance of probabilities. The contention of the prosecution was that the defence had to prove beyond reasonable doubt that the appellant was within the words of the Act of Parliament as a reasonable probability. That linked together the two standards of proof, but they do not become more manifest because they are run together. In his summing-up Ashworth J. equated the weight of the onus on the defence with the onus on the prosecution in proving the main issue. That is clear from his direction to the jury that before giving effect to the special defence they must be " satisfied " and if not satisfied must reject it. He said that fairly and squarely the burden was on the defence. Finally he directed them: " Lastly on this point, " if you are not satisfied that [the appellant] was suffering from " such abnormality as I have been dealing with, then, members " of the jury, you must take it from me that it is your duty to " reject this defence. Something has been said about balance " of probabilities and about the burden of proof, and about doubt, " and so on. I prefer to leave you with the simple words of the " Act of Parliament, ' . . . it shall be for the defence to prove " ' . . .' and if it does not, the defence goes." Those words could only be understood as a rejection of the principle of the balance of probabilities and as a direction that the equivalent burden fell on the defence as on the prosecution. This court decided in *Rex* v. *Carr-Briant* [2] that that is not correct. See also the decision of the Privy Council in *Sodeman* v. *Regem,*[3] where the defence was insanity, and the directions of the Lord Justice-Clerk (Lord Cooper) in *H.M. Advocate* v. *Braithwaite.*[4] Moreover, it is not sufficient for a judge to leave the jury with the words of the Act of Parliament. They should be directed as to the meaning of the word " proof." Here there was no proper direction. The appeal should be allowed.

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[2] [1943] K.B. 607; 59 T.L.R. 300; [1943] 2 All E.R. 156.

[3] [1936] W.N. 190; [1936] 2 All E.R. 1138.

[4] 1945 S.C.(J.) 55, 58.

Geoffrey Veale Q.C. and *J. B. Willis* for the Crown. It is conceded that the judge gave no direction as to any different standard of proof resting on the defence and the prosecution, but it is submitted that there is very little difference between the two burdens. Under section 2 (2) of the Act of 1957 it is "for "the defence to prove" diminished responsibility. It must therefore be for the defence to "satisfy" the jury, because there can be no proof without satisfaction. In substance, that is what the judge has said throughout. He has never used the word "sure" or "satisfied beyond all reasonable doubt" except in relation to the burden on the prosecution. The proper approach to this matter is that made by Denning L.J. in *Bater* v. *Bater.*[5] There is no absolute standard of proof in either civil or criminal cases. In criminal cases the charge must be proved beyond all reasonable doubt, but there may be degrees of proof within that standard. In *Cant* v. *Alexander Harley & Sons Ltd.*[6] it was said by du Parcq J.[7] that a distinction must be drawn between "proof "beyond all reasonable doubt" and "proof," but that it was quite unnecessary for magistrates to deal with any subtleties of language. Magistrates ought to ask themselves "Is it proved "or not . . ." Similarly, it is submitted, in the case of jurors.

[LORD GODDARD C.J. *Cant* v. *Alexander Harley & Sons Ltd.*[8] was not cited in *Rex* v. *Carr-Briant.*[9] It is difficult to reconcile the two decisions.]

Rex v. *Carr-Briant* [9] was a corruption case, but it based itself on *Sodeman's* case,[10] where the defence was insanity and from which case this distinction sprang; but there this point was not argued. *Sodeman's* case [10] was criticized by the Irish Court of Appeal in *The People* v. *Fennel,*[11] which was itself criticized in *Rex* v. *Carr-Briant* [12] as having misquoted the direction of the trial judge in *Sodeman's* case.[13] So far as the defence of insanity is concerned, the fountain head on the question of the burden of proof is *M'Naughten's* case,[14] which by no means says that there is a less onus on the defence than there is on the prosecution. [Reference was also made to *Rex* v. *Evans-Jones* [15] and *Rex* v. *Jefferson.*[16]]

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[5] [1951] P. 35, 37; 66 T.L.R. (Pt. 2) 589; [1950] 2 All E.R. 458.

[6] [1938] 2 All E.R. 768.

[7] Ibid. 773.

[8] [1938] 2 All E.R. 768.

[9] [1943] K.B. 607.

[10] [1936] W.N. 190; [1936] 2 All E.R. 1138.

[11] [1940] I.R. 445, 449.

[12] [1943] K.B. 607.

[13] [1936] W.N. 190.

[14] (1843) 10 Cl. & Fin. 200.

[15] (1923) 17 Cr.App.R. 121.

[16] The Times, July 20, 1908.

[LORD GODDARD C.J. referred to *Woolmington* v. *Director of Public Prosecutions*,[17] *per* Viscount Sankey L.C.] [The same principle of law ought to apply to diminished responsibility as to actual insanity. It is difficult to appreciate *Sodeman's* case,[18] where this doctrine first emerged, without knowing the actual expression used by the trial judge.]

[The case was adjourned for a week in order that the petition to the Privy Council in *Sodeman's* case [18] could be obtained. LORD GODDARD C.J. intimated that the hearing would be resumed before a court of five judges. At the resumed hearing LORD GODDARD C.J. said that it had not been possible to obtain a copy of the petition in *Sodeman's* case.[18] The hearing was resumed before the same court of three judges.]

July 1. *Sir Reginald Manningham-Buller Q.C., A.-G.*, intervened on behalf of the Crown. It is conceded that under the statute there is a lesser burden of proof on the defence in proving diminished responsibility than there is on the prosecution generally in criminal cases. To that extent the argument put forward by Mr. Veale is abandoned, as the proposition that the defence must be proved beyond any reasonable doubt cannot be supported. Having established that, it is submitted that on the proper assessment of the burden of proof required of the defence the judge gave a proper direction in this case.

[LORD GODDARD C.J. referred to *Rex* v. *Carr-Briant*.[19]]

That was a corruption case and it was concerned with the rebuttal of a presumption. The last passage in the judgment was directed to the old rule in the *Abramovitch* case [20] and for the purpose of the present case can be ignored. Evidence which satisfies the jury that there is " a probability " may be sufficient to rebut a presumption, but the position is very different where there is a distinct and separate issue such as insanity or diminished responsibility which has to be proved. There was no such separate issue in *Rex* v. *Carr-Briant*.[21] To put such an interpretation on the words of this subsection would amount to amending the Act. In any event *Rex* v. *Carr-Briant* [21] was not an insanity case.

[BYRNE J. It was decided in *Rex* v. *Carr-Briant* [21] that not more than a probability was required to establish that which the prisoner was called upon to establish. The reason why the court said that was because of what had been said in *M'Naughten's* case,[22] that "to establish insanity it must be clearly proved . . ." Ever since the decision in *Rex* v. *Carr-Briant*[23] insanity has been dealt with on the basis that the degree of proof required was in accordance with that decision. Is it your contention that diminished responsibility, which may be described as partial insanity, should be treated differently from insanity?]

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[17] [1935] A.C. 462, 475; 25 Cr. App.R. 89.

[18] [1936] W.N. 190. 2 AER 1138

[19] [1943] K.B. 607.

[20] (1914) 11 Cr.App.R. 45.

[21] [1943] K.B. 607.

The Crown does not seek to show that there is any greater burden on a person who sets up the defence of diminished responsibility than there is on one who is trying to establish insanity, but to prove insanity there must be a "preponderance" of probability. That is a different thing from saying that it can be proved by bringing forward evidence to show that there is "a "probability." Parliament must be taken to have legislated on the background of *Sodeman's* case[24] and *Rex* v. *Carr-Briant*[25] and to have used the words "it is for the defence to prove" with the intention that they should be interpreted in accordance with those decisions when properly appreciated. The Crown does not seek to challenge the decision in *Sodeman's* case.[26] There was no argument there as to the relative weight of the onus on the defence and the prosecution. What had happened was that in the High Court of Australia the judge had not made it plain to the jury that there was a distinction between the two. As to *Rex* v. *Carr-Briant*,[27] it is not a correct interpretation of the decision to regard it as establishing that the burden of proof of insanity or of diminished responsibility is discharged by showing that there is a probability of either. If, on the true reading of the judgment, it is to be taken to mean "balance of probabilities," then the Crown would have no criticism to make of it. It is apparent from the nature of this legislation that the intention of Parliament was to extend the law of Scotland to this country. The words used by the Lord Justice-Clerk (Lord Cooper) in *H.M. Advocate* v. *Braithwaite*[28] were "balance of probability." Where the words "balance" or "preponderance" are used, they mean more than satisfying the jury of the mere fact of a probability.

[LORD GODDARD C.J. In this summing-up the judge did not deal with the balance of probabilities. He said that he would leave the jury with the words of the section.]

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[22] 10 Cl. & Fin. 200.
[23] [1943] K.B. 607.
[24] [1936] W.N. 190.
[25] [1943] K.B. 607.
[26] [1936] W.N. 190.
[27] [1943] K.B. 607.
[28] 1945 S.C.(J.) 55, 58.

Had the direction been left there it could not have been supported by the Crown, because it is incumbent upon a judge to tell the jury the degree of proof required. But the judge did in fact give a clear and positive direction when, having summed up with great care on the question of diminished responsibility, he ended by saying: " You must consider it as a factor . . . weigh " up negatives and positives and only if you think the balance " comes down on one side can you find him guilty." So far as the burden of proof on the defence was concerned, that was a correct direction. The jury were told that the question was to be decided on the balance of probabilities. It is not for a court to lay down to what precise degree that balance has to be tipped. As to the extent of proof required, the phrase " prove beyond " reasonable doubt " used in the past to describe the burden on the prosecution in a criminal case is indicative of the degree of certainty required in the mind of the jury. It indicates a high degree of certainty but not an absolute one: see *Hornal* v. *Neuberger Products Ltd.*[29] and *Bater* v. *Bater.*[30] Where there is a defence such as insanity or diminished responsibility the burden is not so great and is expressed by another formula, " balance of " probabilities "—but when that formula is applied, the degree of certainty in the mind of the jury must be such as to lead them to be satisfied. The judge correctly used the word " satisfied " in relation to the defence. If there is any criticism to be made of the summing-up it may well be that the direction as to the burden on the prosecution was not sufficiently strong. If it had been necessary for the jury to give as close an examination to the facts of the case as they had to give to the issue of diminished responsibility it would have been essential for their attention to have been drawn to the heavy burden that lay on the prosecution to prove the facts with a high degree of certainty. But that issue did not arise. Looking at the summing-up in the light of the words of the subsection, it is submitted that the jury were adequately directed on the issue of diminished responsibility and the appeal should be dismissed.

Stanley-Price Q.C. was not called upon to reply except on the question of sentence in the event of the appeal being allowed.

Lord Goddard C.J. The court have carefully considered the argument addressed to them in this case, which is one of great importance and the first on the structure of this statute which has come before the court. We are allowing the appeal and substituting a verdict of manslaughter. The court will put their judgment into writing.

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[29] [1957] 1 Q.B. 247; [1956] 3 All E.R. 970.

[30] [1951] P. 35.

July 5. LORD GODDARD C.J. read the following judgment of the court. The appellant was convicted before Ashworth J. at the last assizes for Newcastle-upon-Tyne of capital murder in that on or about March 5, 1957, he murdered Selina Mewes in the course or furtherance of theft. There was no dispute that the prisoner had killed the woman in question and that he did so after breaking into her house for the purpose of stealing. The only defence raised was under section 2 of the Homicide Act, 1957, which provides that "where a person kills . . . another, he "shall not be convicted of murder if he was suffering from such "abnormality of mind (whether arising from a condition of "arrested or retarded development of mind or any inherent "causes or induced by disease or injury) as substantially "impaired his mental responsibility for his acts and omissions "in doing or being a party to the killing," this defence being generally known as one of diminished responsibility. By subsection (2) it is provided: "On a charge of murder, it shall be "for the defence to prove that the person charged is by virtue of "this section not liable to be convicted of murder," and by subsection (3) it is provided: "A person who but for this "section would be liable, whether as principal or as accessory, "to be convicted of murder shall be liable instead to be con"victed of manslaughter." [His Lordship stated the facts and continued.] At the trial a psychiatrist was called for the defence, and although the evidence which he gave was of a somewhat vague description, he did say that the prisoner in his opinion was a psychopath and was suffering from an abnormality of mind. The evidence of the prison doctors, while agreeing with some of the evidence that the psychiatrist had given, was that they were firmly of opinion that the prisoner was not a psychopath, and this issue was left to the jury by the judge. The court desires to say at once that in their opinion no fault could be found with his charge to the jury as to what constituted diminished responsibility. It is a defence which the Act has borrowed from the law of Scotland and the judge's direction to the jury was quite in accordance with the directions which have been given by the Lords of Justiciary, and in particular we would refer to the charge of the Lord Justice-Clerk, afterwards Lord

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Justice-General (Lord Cooper), in *H.M. Advocate* v. *Braithwaite.*[1] Nor can any fault be found with the judge's statement of the facts. The appeal was solely based on, and the only matter discussed before us was, whether he had given a proper direction to the jury as to the burden which was on the defence when setting up a plea of diminished responsibility. In addressing the jury Mr. Stanley-Price, for the defence, had contended that the jury were only concerned with the balance of probabilities and that it was not for the defence to establish the defence by the same high degree of proof as that which is demanded of the prosecution in proving a criminal offence. Mr. Veale, for the prosecution, contended that the defence had to prove beyond reasonable doubt that the defendant came within the words of the section. He added: "They have to prove beyond any "reasonable doubt that he is within those words as a reasonable "probability." The judge dealt with this matter more than once in his summing-up. Early in his summing-up he said: "Let me tell you what Parliament has said, and, after all, that "is what you and I have got to go by. 'On a charge of murder, "'it shall be for the defence to prove that the person charged "'is by virtue of this section not liable to be convicted of "'murder.' That is what Parliament has said: fairly and "squarely the burden is placed on the defence." A little later on and shortly before the mid-day adjournment he said: "Lastly, "on this point, if you are not satisfied that he was suffering "from such abnormality as I have been dealing with, then, "members of the jury, you must take it from me that it is your "duty to reject this defence. Something has been said about "balance of probabilities and about the burden of proof and "about doubt, and so on. I prefer to leave you with the simple "words of the Act of Parliament, '. . . it shall be for the "'defence to prove'; and if it does not, the defence goes." The Attorney-General, who intervened in this case on the appeal, conceded that in view of the decision in *Rex* v. *Carr-Briant*[2] that this was not an adequate direction. That case, which is binding on us, decided that where either by statute or at common law some matter is presumed against an accused person unless the contrary is proved the jury should be directed that it is for them to decide that the contrary is proved, and that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt and that this burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called on to establish. This is often cited as showing that where an onus is placed on an accused person it may be discharged by proving what would be enough to support a verdict in a civil action, and that, to use the words of Willes J. in *Cooper* v. *Slade*,[3] "in "civil cases the preponderance of probability may constitute "sufficient ground for a verdict."

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[1] 1945 S.C.(J.) 55, 58.

[2] [1943] K.B. 607; 59 T.L.R. 300; [1943] 2 All E.R. 156.

The Attorney-General, however, contended that the later passages in the judge's summing-up corrected any wrong impression the jury might have got from the words which we have already quoted. While dealing with the evidence of Dr. Orton, the psychiatrist, he said: "The way to do it," that is, to do justice, "is to look at the evidence in the light of the whole of the "facts and ask yourselves quietly and soberly: 'Am I satisfied "'that the defence have proved that he was suffering in the "'way indicated?'" and his final direction to the jury was this: "The way I would direct you to consider this issue is to "look, first, and form your own view about the history in the "sense of what was the proper description of his working record "and his after-care, and so on, and then to recall to your minds "the doctors' evidence, and then to ask yourselves very carefully: "'Out of all these factors which may help to build up the picture "'of a psychopath, or may tend against him, where is the "'balance?' And, members of the the jury, unless the balance "is brought down in favour of abnormality the defence must fail. "That is important." But the judge nowhere, probably because the *Carr-Briant* case[4] was not cited to him, pointed out to the jury the difference between the onus which is on the prosecution and that which is on the defence. The last passage which, had it stood alone, might have supported the verdict was not, we think, sufficient considering the very strong directions which the judge had given earlier in his summing-up that the burden must rest fairly and squarely on the defence and that he would leave the question of probabilities or doubts simply in the words of the section. /We think it must be pointed out to a jury in these cases that the burden on the defence is not as heavy as the burden on the prosecution. ' That this is the law of Scotland as well as the law of England is clear from *Braithwaite's* case,[5] which we have already cited, where the Lord Justice-Clerk in concluding his charge to the jury said[6]: "If you think the

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[3] (1858) 6 H.L.C. 746, 772.

[4] [1943] K.B. 607.

[5] 1945 S.C.(J.) 55.

[6] Ibid. 58.

"balance of probability to be in favour of that defence, you must "sustain it, and your verdict will be culpable homicide. If, on "the other hand, doing your duty fearlessly and honestly to the "best of your ability, you cannot find in the evidence laid before "you material to justify the conclusion that the balance of "probability is in favour of this defence, then I have to tell you "that it is your duty to return a verdict of murder." If that direction had been given it is indeed highly likely, considering the somewhat vague nature of the psychiatrist's evidence and the positive evidence of the doctors called for the prosecution, that the jury would have returned the verdict which they did, but in a matter which makes a difference between a capital sentence and a sentence only of imprisonment we feel it would be undesirable for the court to consider applying the proviso and, accordingly, we have already directed that a verdict of manslaughter should be entered instead of one of capital murder and the prisoner sentenced to imprisonment for life. Accordingly the appeal is allowed to that extent.

Appeal allowed in part.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

E. M. W.

C. A.

1957
July 25, 26.

Lord Evershed M.R., Morris and Pearce L.JJ.

In re B., An Infant.

Court of Appeal—Jurisdiction—Appeal against adoption order—Mother's consent to adoption dispensed with—Subsequent objection—Jurisdiction of court to determine validity of order—County Courts Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 105—*Adoption Act*, 1950 (14 *Geo.* 6, *c.* 26), *ss.* 2 (4), 3 (1) (*a*)—*Adoption of Children (County Court) Rules*, 1952 (*S.I.* 1952, *No.* 1258), *r.* 9—*R.S.C.*, *Ord.* 58, *r.* 3.

Adoption—Adoption order—Validity—Jurisdiction of Court of Appeal.

A county court judge dispensed with the consent of a mother to the making of an adoption order. The mother appealed against the order and the question arose whether the Court of Appeal had jurisdiction to determine the validity of the order:—

Held, that whether or not the mother was a "party" to the proceedings within section 105 of the County Courts Act, 1934, the Court of Appeal had, within R.S.C., Ord. 58, jurisdiction, and, in the circumstances, the order should be set aside and the case referred back to another county court for a rehearing.

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APPEAL from Judge Rice-Jones, sitting at Croydon County Court.

On February 25, 1957, Judge Rice-Jones made an order for the adoption of a child and dispensed with the consent of the child's mother to the making of the order. At the time when the order was made the address of the mother was known to the judge. The mother appealed against the order and at the hearing of the appeal the court took the point whether it had jurisdiction to determine the validity of an adoption order at the suit of the mother, who had not taken any part in the proceedings in the county court.

R. M. G. Simpson for the mother. The Court of Appeal has jurisdiction under the general powers conferred by section 105 of the County Courts Act, 1934.[1] The consent of the parent to the making of the order is required under section 2 of the Adoption Act, 1950,[2] and she is, therefore, entitled to come in as an appellant.

[LORD EVERSHED M.R. Section 105 applies only to persons who are parties to the proceedings in the county court.]

Rule 9 of the Adoption of Children (County Court) Rules, 1952,[3] requires that every person whose consent to an order has to be obtained must be notified of an application. The judge may dispense with the serving of the notice if application is made to him to do so, but the rule goes on to state that any person on whom notice is required to be served "shall be a respondent to "the application." Therefore, whether the mother was, or was

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[1] County Courts Act, 1934, s. 105: "If any party to any proceedings in "a county court is dissatisfied with "the determination of the judge . . . "the party aggrieved by the judgment, direction, decision or order of "the judge may appeal therefrom to "the Court of Appeal. . . ."

[2] Adoption Act, 1950, s. 2 (4): "Subject to the provisions of section 3 "of this Act, an adoption order shall "not be made . . . in any case, except "with the consent of every person ". . . who is a parent . . . of the "infant."

[3] Adoption of Children (County Court) Rules, 1952 (S.I. 1952, No. 1258), r. 9: "At the time of appointing a guardian ad litem, the registrar "shall fix a date and time for the "hearing of the application, and shall "serve a notice in the form number 3 "in the First Schedule to these rules "on the following persons: (*a*) every "person, not being an applicant, "whose consent to the order is "required under subsection (4) of "section 2 of the Adoption Act, 1950. "Provided that where the applicant "includes in his originating application a request that the consent of "any such person be dispensed with, "the judge may, on an ex parte "application of the applicant, order "that a notice shall not be served on "that person unless he so directs . . . "and any person upon whom a notice "is required to be served under this "rule shall be a respondent to the "application."

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not, notified, she was a party to the proceedings for the purposes of section 105 of the Act of 1934.

She is entitled to be heard, but she cannot go back to the county court judge and ask him to review his order, for there are no new facts that she can bring before him and he would, therefore, be most unlikely to alter his decision. It is submitted, however, that the evidence which was before him would not have sufficed to enable him to dispense with the mother's consent on any of the grounds set out in section 3 (1) (*a*) of the Act of 1950,[4] having regard to *Watson* v. *Nikolaisen.*[5]

[LORD EVERSHED M.R. In a civil court a defendant may appear after judgment has been given against him in default of appearance and seek to explain his absence and, if the judge is satisfied, he will set aside the order and fix a date for hearing, as was done in a recent Rent Act case where the defendant was told by an officer of the court that he need not appear.]

In such a case the appellant would have been a defendant, but it is doubtful whether this mother could be so described. Order 37, r. 1, gives a general power to order a new trial on such terms as the court thinks reasonable.

[LORD EVERSHED M.R. Order 37 does not fit this case, since no order has been made against the mother.]

[*J. B. R. Hazan*, intervening, for the adopter. In *In re P.*[6] both the mother and the putative father were present at the hearing in the court below. Order 37 would not apply to the mother in this case.]

Conolly Gage for the guardian ad litem, but as amicus curiae on the procedural point. The proceedings before the Court of Appeal are misconceived, because the gravamen of the appeal is that the mother was not a party to the application and she should have been. Rule 9 will not bear the interpretation which it is sought to put on it. If the judge in exercise of his powers dispenses with the need to serve a notice on the mother, then the mother is not a person on whom notice is "required" to be served. The proper course in this case was to apply for a prerogative writ to have the proceedings brought up in the Queen's Bench Division and quashed.

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[4] Adoption Act, 1950, s. 3 (1): "The court may dispense with any "consent required by paragraph (*a*) "of subsection (4) of section 2 of this "Act if it is satisfied—(*a*) in the case "of a parent or guardian of the infant, "that he has abandoned, neglected "or persistently ill-treated the infant "... (*c*) in any case, that the person "whose consent is required cannot "be found or is incapable of giving "his consent or that his consent is "unreasonably withheld."

[5] [1955] 2 Q.B. 286; [1955] 2 All E.R. 427.

[6] (1954) 118 J.P. 151.

There was nothing to prevent the judge treating the case on the footing that the mother had refused her consent and considering whether her refusal was reasonable or not. On the evidence before him he may well have concluded that she did not want the child.

[LORD EVERSHED M.R. It would have been proper to have informed the mother and adjourned the application to give her an opportunity of putting her views before the court. The infant's welfare is not the primary consideration in these cases, and it is difficult to take away a parent's rights without giving her any opportunity of being heard.]

J. B. R. Hazan for the adopter. The mother was not a party and cannot appeal. To determine who is a party, regard must be had to the statute under which proceedings are brought, but the Act of 1950 is silent as to who is to be a party to an application for an adoption order. There is no reason to assume that a parent is a party until he or she is made one and served with notice of the proceedings. Section 191 (*p*) of the County Courts Act, 1934, defines who is a party to the proceedings in the county court, but that definition would not cover the mother in the present case.

[PEARCE L.J. But if this is right, if the applicant wrongfully omits to notify the parent, he or she is left without a remedy.]

The adopter does not seek to shut the mother out, but it is difficult to see under what power she can come in. She has no locus standi in the Court of Appeal nor can she go back to the county court, for the judge is functus officio. It is unsatisfactory to deal with the matter in this court, for it is not clear on what ground the judge sought to exercise his jurisdiction to dispense with the mother's consent.

LORD EVERSHED M.R. This case arises under the jurisdiction conferred upon the county court by the Adoption Act, 1950. Upon the merits of the present appeal I propose to say very little. The substance of the case made by Mr. Simpson, for the infant's mother, is this: that an order was made on February 25, 1957, by the county court judge for the adoption of the child by the present respondent, and that the county court judge, exercising the jurisdiction which section 3 (1) of the Act confers upon him, dispensed with the consent of the infant's mother —though it is not clear on which of the grounds presented

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by that section the jurisdiction was exercised. In fact, the mother (whose address was known to the county court judge at the time, though she lives in South Australia) does not consent to the order; and we have come to the conclusion that it would not be right, in all the circumstances, that an order for the adoption of this boy should be made, at any rate without giving to the mother a proper opportunity of presenting her case to the county court. Subject, then, only to the question of our jurisdiction, we propose to order that the county court judge's order of February 25 be set aside, and that the matter be referred back to the county court. In accordance with our usual practice—which does not imply any reflection, of course, upon the particular county court judge—we also direct that the matter be heard by another county court judge of the appropriate district.

In the course of the argument upon the substance of the case, there was some debate upon the exact significance of the word "neglected" in subsection (1) (*a*) of section 3 of the Act. We do not, in the circumstances, think it necessary or desirable to say anything upon that matter. Therefore, upon the merits and substance of the case I shall say nothing more. But I have so far assumed (as I think is correct) that this court has jurisdiction to deal with this as an appeal. The right of appeal to this court from a county court is conferred by section 105 of the County Courts Act, 1934. [His Lordship read the section and continued:] But it was submitted (very properly) that that section does not apply to the mother here, seeing that she is not and was not a party to the proceedings within the meaning of that section.

To resolve that question it is necessary to turn back to the Adoption Act, 1950. [His Lordship read section 2 (4) of the Act and rule 9 of the Adoption of Children (County Court) Rules, 1952, as set out above. He continued:] It is not in doubt that the mother of this infant, being a person whose consent was required under section 2 (4) of the Act, unless dispensed with, was a person upon whom the notice was required to be served. That, however, is subject to the effect of the proviso to rule 9. I am not entirely clear whether in fact the terms of that proviso were strictly complied with—whether, on any such application as is there indicated, any order was made dispensing with service of the notice. For present purposes, however, that does not matter.

Mr. Simpson, for the mother, has argued that she is a person upon whom notice is required to be served under rule 9, even though such service were properly dispensed with under the proviso; and that, being such a person, she is properly described as a "party" to the proceedings. I think that there is great force in that argument. But, in any event, in my judgment, the general jurisdiction conferred upon this court by R.S.C., Ord. 58, would suffice if it could not properly be said that the mother was here a "party" to the proceedings within the meaning of section 105 of the County Courts Act, 1934. According to the note on p. 1244 of the Annual Practice, 1957 ed., it is said: "But in addition, in accordance with old Chancery practice, any "person may appeal by leave (obtained on ex parte motion to the "Court of Appeal) if he could by possibility have been made a "party to the action by service"; and a number of cases are cited. There cannot be any doubt that by possibility the mother could have been made a party, in the strict sense, by being a respondent to the application and, in fact, in the present case leave was given by this court for the mother to bring the matter here. I, therefore, am satisfied in this case that there is jurisdiction in this court to hear and determine the question of the validity and propriety of the order of February 25 as upon an appeal.

But before I leave the case, I would like to add one or two observations. Bringing a matter of this kind to the Court of Appeal is likely to involve a good deal of expense. The rules of this court as to leading fresh evidence are of long standing and are strict. Prima facie, evidence cannot be adduced in this court which was not before the court below; and before additional evidence is adduced, the leave of the court (in general) has to be obtained. There can, I think, be no objection to the evidence that was put before us here; and, indeed, none of the other persons concerned—neither the respondent applicant nor Mr. Conolly Gage (who appeared for the local authority as guardian ad litem) did so object. But I do suggest that considerable caution and discretion should be exercised in adding to the costs by making a number of affidavits at this stage. It seems to me that, at any rate in anything but a very exceptional case, this court could do no other than (if it thought appropriate) discharge the order made and send the case back for further adjudication. In other words, I think—again always except in some very unusual case—that it would not be right for this court (which has not the opportunity of seeing the persons concerned and so on) itself to make orders. Apart from all other considerations, this court sits (except, again, in very exceptional cases) in public;

and in the interests of everybody it is not desirable that the names of the persons concerned and the facts which are put before the court should become public property, in the very obvious and natural interests of the children concerned. That being so, it has seemed to me that consideration might well be given, at some appropriate stage by the appropriate authority, to some revision of the County Court Rules. Order 37, r. 1, enables a judge of the county court to order a new trial in certain circumstances. It seems to me that the order made upon this application could not fairly be called a "trial," as that word is normally understood. Rule 2 of the same order provides: "Where a defendant to an action or matter . . . does not appear "at the hearing and a judgment or order is given or made against "him in his absence, the judgment or order and any execution "thereon may on application be set aside and a new trial may be "granted." Again, in its context it would not appear to me, I confess, that that rule is applicable to such a case as this. But it seems to me worth considering whether an amendment or expansion of that rule might not be made so as to enable, in cases of this kind and other appropriate cases, the costs of an application to the Court of Appeal to be avoided, and to give to a person like the mother in the present case an opportunity of going to the county court and, if the case warranted it, inviting the county court judge to set aside the order he had made and rehear the matter in the presence of the parent concerned.

I say nothing of the procedure in the Chancery Division, because that is not before us. But a similar problem might, of course, arise there; and similar provisions might be made, if thought appropriate, in the Chancery Rules. So far as the present case is concerned, I have said enough. I am satisfied, in the circumstances, of the jurisdiction of this court. I have indicated what, exercising that jurisdiction, I think the order should be that we now make.

Morris L.J. I entirely agree.

Pearce L.J. I agree.

Adoption order set aside.
Case referred back to county court.

Solicitors: *Kinch & Richardson for Copley, Singleton & Billson, Croydon; Norman W. Parris, Croydon; Sharpe, Pritchard & Co.*

E. D.

LAW (VALUATION OFFICER) v. WANDSWORTH BOROUGH COUNCIL.

PARKIN (VALUATION OFFICER) v. CAMBERWELL BOROUGH COUNCIL.

C. A.

1957
July 11.

Lord Evershed M.R., Morris and Pearce L.JJ.

Rates and Rating—Crematoria—Acquired under Burial Act, 1852—*Whether qualified for rating relief afforded to burial grounds—Meaning of "deemed"—Burial Act,* 1852 (15 *&* 16 *Vict. c.* 85), *s.* 26—*Burial Act,* 1855 (18 *&* 19 *Vict. c.* 128), *s.* 15—*Cremation Act,* 1902 (2 *Edw.* 7, *c.* 8), *s.* 4.
Cemetery—Cremation.

Section 15 of the Burial Act, 1855,[1] provides that land acquired by a local authority under powers conferred, inter alia, by section 26 of the Burial Act, 1852, for the purpose of providing a burial ground shall be valued for the purposes of assessment to rates by reference to the value as at the date of acquisition:—

Held, that by virtue of section 4 of the Cremation Act, 1902, crematoria acquired by a local authority under the Act of 1852, were also exempt from rating, since section 4 did not confer additional powers on authorities to provide crematoria but said that its existing powers "shall be deemed to extend to" their provision.

CASES STATED by Lands Tribunal (Sir W. Fitzgerald Q.C.).

The appeals, which raised the same question, were heard together, and determined on the case stated as regards the first appeal only.

On March 30, 1953, Bernard Law, the valuation officer for the Metropolitan Borough of Wandsworth, made a proposal to alter the description of a hereditament situate at Kingston Road, London, S.W.15, in the valuation list for that area from "cemetery and two lodges" to "cemetery lodges and crematorium" and to increase the assessment therein from £68 gross value, £50 rateable value to £4,125 gross value, £2,750 rateable value on the grounds that the existing assessment was incorrect and insufficient. On April 14, 1953, the Mayor, Aldermen and Councillors of the Metropolitan Borough of Wandsworth (hereinafter called "the council") duly gave notice of objection to the proposal on the grounds that the then existing assessment in the valuation list should not be altered. On May 1, 1953, the valuation officer duly gave notice of appeal to the local valuation court on the ground that the valuation list should be altered in accordance with his proposal. On May 18, 1955, the local valuation court determined the appeal by directing that the description of the hereditament be altered from "cemetery and two lodges" to "cemetery lodges and crematorium" and that the assessment be increased from £68 gross value, £50 rateable value to £756 gross value, £255 rateable value. On May 23, 1955, the valuation officer duly gave notice of appeal to the Lands Tribunal against the decision of the local valuation court.

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[1] Burial Act, 1852, s. 26: "For "the providing . . . [burial grounds] "it shall be lawful for the burial "board" [now the local authority] ". . . to purchase from any company "or persons entitled thereto any "cemetery or cemeteries . . ."

Burial Act, 1855, s. 15: "No land "already or to be hereafter purchased "or acquired, under the provisions of "[the Burial Act, 1852] for the "purpose of a burial ground (with "or without any building erected or "to be erected thereon), shall while "used for such purposes be assessed ". . . [as therein mentioned.]"

Cremation Act, 1902, s. 4: "The "powers of a burial authority to pro"vide and maintain burial grounds "or cemeteries, or anything essential, "ancillary or incidental thereto, shall "be deemed to extend to and include "the provision and maintenance of "crematoria."

The council gave notice of their intention to appear at the hearing of the appeal before the Lands Tribunal.

At the hearing before the Lands Tribunal the following facts were agreed between the parties: (1) Pursuant to a scheme made under section 4 of the London Government Act, 1899, which was confirmed by the Queen in Council on August 7, 1900, the council is the successor to the Wandsworth, Streatham, and Putney Burial Boards respectively, and is the burial authority for the Metropolitan Borough of Wandsworth.

(2) The council is the owner of five cemeteries in the borough as follows . . . (v) *Putney Vale Cemetery and Crematorium, Kingston Road, Wandsworth.* . . .

(4) [as to the land used in part as a crematorium] This land was acquired by the council's predecessors—the Putney Burial Board—on March 25, 1887, in pursuance of section 26 of the Burial Act, 1852. It became vested in the council when the powers, duties, property and liabilities of that board were transferred to the council by virtue of the scheme referred to in preceding paragraph (1) hereof.

(5) [as to the land used in part as a "Garden of Remembrance"] This land was acquired by the council on April 13, 1907, in pursuance of section 150 of the Metropolis Management Act, 1855, for the purposes of a refuse shoot. The conveyance from the Fitzgeorge Estate, however, reserved to the council the right to use the land for a cemetery, and on September 27, 1926, the Minister of Health, in pursuance of sections 9 and 29 of the Burial

Act, 1852, and an application made to him by the council under a resolution passed at a meeting of the council on March 23, 1926, gave his consent to the use of the land for burial purposes. . . .

(10) . . . Buildings have been erected and works constructed in the cemetery as follows, viz.: (i) . . . (c) The chapels and crematorium. The chapels—one for the use of Church of England denominations and the other as a non-conformist chapel—were in being when the land became vested in the council as stated in preceding paragraph (4) hereof having been erected by the Putney Burial Board in 1891. They remained as first erected until 1937 when both chapels were enlarged and the crematorium added as an extension of the same building. The Church of England chapel was gutted by fire on December 12, 1946, and has not yet been rebuilt. (ii) . . . A Garden of Remembrance containing ornamental brick arches and dwarf walls with lawns, flower beds, lily ponds, fountain and sundial.

(11) On May 5, 1936, the council, in pursuance of the Cremation Act, 1902, decided to construct a crematorium . . . on [specified land] and to allocate and describe as a " Garden of Remembrance " [other] land.

Necessary consents having been sought and obtained from the Minister of Health, the Home Secretary and the Consistorial and Episcopal Court of Southwark respectively, the adaptation of the then existing chapels and the work necessary to complete the proposed " Garden of Remembrance " was completed on May 25, 1938.

. . . The crematorium part of the building shown . . . which includes the furnace room, columbarium and Memorial Tablet hall, is used for the purposes of cremation only, and the said " Garden of Remembrance " is used only in connexion with the said crematorium. . . .

(20) In the council's accounts, Putney Vale cemetery and crematorium is treated as one undertaking and, for income tax purposes, the Inland Revenue assess, under Schedule D, Case I, the cemetery and crematorium as one undertaking.

10. It was further agreed between the parties that the land [which included the " Garden of Remembrance "] referred to in (5) above being land acquired under section 150 of the Metropolis Management Act, 1855, was not land purchased for the purposes of a burial ground within section 15 of the Burial Act, 1855 . . .

11. Alternative values were agreed between the parties as follows:—(i) That if it were decided by the Lands Tribunal that all the land comprised in the hereditament except that purchased under the Metropolis Management Act, 1855, is within section 15 of the Burial Act, 1855, the value of the hereditament should be £756 gross value, £255 rateable value; and (ii) that if the Lands Tribunal found that the only parts of the hereditament within section 15 of the Burial Act, 1855, were the cemetery parts, the hereditament should be assessed at £4,125 gross value, £1,339 rateable value.

12. It was contended on behalf of the valuation officer that those parts of the hereditament used for or in connexion with the purposes of cremation only were not land used for the purposes of a burial ground within the meaning of section 15 of the Burial Act, 1855, and were therefore not within the scope of the said section.

13. It was contended on behalf of the Wandsworth Borough Council that those parts of the hereditament used for or in connexion with the purposes of cremation were entitled to the benefit in respect of rates of section 15 of the Burial Act, 1855.

14. Counsel for the council argued that if the land was bought under the Burial Acts for the purpose of a burial ground under these Acts then under the Cremation Act, Parliament has said that land may also be used and maintained as a crematorium, and he submitted that when you read section 4 of the Cremation Act back into section 15 of the Burial Act you can read it as meaning "No land already or to be hereafter purchased or acquired, under the provisions of the Burial Acts for the purpose of a burial ground, a phrase which shall be deemed to include the provision and maintenance of a crematorium with or without any building erected or to be erected thereon while used for such purposes"—that is, the purposes of a burial ground including a crematorium—"may be assessed to any rate," and so on. In other words, once land has been acquired under section 15 of the Burial Act, the relief given by section 15 in regard to rates applies if it is used as a crematorium.

The tribunal was of opinion that the argument of counsel for the council was correct. It seemed to the tribunal that the object of the Burial Act, 1855, was to give to the appropriate public body, at that time usually a vestry, and now a borough council, power to acquire land for the purpose of burial and generally to

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regulate the burial of persons. When the Act was passed cremation was not recognized as a method of disposal of the dead. Since then cremation has not only been accepted but demanded by a substantial number of persons and it was the opinion of the tribunal that as burial of the dead was a duty imposed on public authorities, cremation should also be undertaken by them.

The tribunal was further of opinion that if it was the intention of Parliament that land used for burial should have certain rating concessions, it would be difficult to justify withholding similar concessions from land used for cremation unless that intention was clearly expressed in the Act, and came to the conclusion that the intention of section 4 of the Cremation Act, 1902, was to extend this rating concession to land acquired under the Burial Act, 1852, and now used for the purposes of cremation. For those reasons the appeal was dismissed.

Maurice Lyell Q.C. and *Patrick Browne* for the valuation officer. "Burial ground" in the ordinary sense does not include a crematorium. Section 4 of the Cremation Act, 1902, does not alter the ordinary meaning of burial grounds to include crematoria; it merely extends the scope of the powers of acquiring land for the provision of burial grounds to apply also to crematoria. Section 4 only touches provisions which grant powers and has no application to section 15 of the Burial Act, 1855, for that is not a section conferring powers but one which gives rating relief in respect of burial grounds. There are other Acts under which local authorities can acquire land for use as burial grounds (Public Health (Interments) Act, 1879, and Public Health Act, 1875, ss. 141, 142, and private Acts), but Parliament has not shown a consistent intention that all land acquired for that purpose should qualify for rating relief. The relief afforded by section 15 of the Act of 1855 only applies whilst and so long as the land is being used for the purposes mentioned in the section.

Patrick Browne followed.

Michael Rowe Q.C. and *David Widdicombe* for the local authorities. Section 26 of the Act of 1852 empowered local authorities to purchase land for the purpose of forming a burial ground or cemetery. By section 4 of the Cremation Act, 1902, those powers were to be deemed to extend also to the provision of crematoria. Section 4 has to be read back into section 26 so that the power there given is deemed to include the power to purchase land for the purpose of forming or providing crematoria.

C. A.
1957

LAW (VALUATION OFFICER) v. WANDSWORTH BOROUGH COUNCIL.

The effect of the section is that the "purpose of providing a "burial ground" includes the purpose of providing a crematorium, and if an authority are acquiring land under the particular Act for a crematorium they are, by virtue of section 4 of the Act of 1902, acquiring it for the purpose of a burial ground. Parliament has not said that land acquired for a crematorium shall be acquired for a burial ground but that land acquired for that purpose shall be deemed to include the other. It follows that the power to use as a burial ground must mean power to use as a crematorium. It must be assumed that the draftsman would be aware of the existence of section 15 of the Act of 1855, and if Parliament had intended to limit the relief afforded by that section it seems likely that crematoria would have been dealt with specifically.

Lyell Q.C. in reply. The proper construction of section 4 is to read it as conferring additional powers, not by extending those which already existed by including within "burial grounds" crematoria.

LORD EVERSHED M.R. This appeal raises in truth an extremely short point but one which has caused me no little difficulty. So far as is now material to the argument the facts can be sufficiently stated thus:

The council acquired at various dates, one of which (it is to be noted) was in 1887, certain land which is now used by them for the purpose of a crematorium and ancillary purposes.

The problem is whether the joint effect of section 15 of the Burial Act, 1855, and section 4 of the Cremation Act, 1902, gives to the council certain rating relief in respect of the land so acquired.

[His Lordship read the relevant sections of the Burial Acts, 1852 and 1855, as set out above and said:] It follows, therefore, that if a local authority were shown to have acquired under the powers of section 26 of the Burial Act, 1852, land for the purpose of a burial ground, then if the land were being so used (and the plural "purposes" in section 15 of the Act of 1852 may, I think, relate to purposes ancillary to the actual cemetery or burial ground) the authority would be entitled to the rating concession.

[His Lordship read section 4 of the Cremation Act, 1902, and continued:] It is not, therefore, in doubt that the power which section 26 of the Act of 1852 conferred or must now be taken as having conferred upon a local authority to obtain land for burial purposes extends so as to enable them to acquire land for crematoria; but does it follow that land acquired under that extended power for crematoria purposes is entitled to the rating concession?

There is in this matter, as appears not uncommon in rating problems, a certain scope for anomaly. The powers of acquiring land for burial grounds are not exclusively derived from Acts mentioned in section 15 of the Burial Act, 1855. One cannot, therefore, get assistance by trying to obtain a result which would in any case be uniform; but, as Mr. Rowe pointed out, such anomalies existed before the Act of 1855 and therefore do not really assist to the solution of the present case.

The point of view put on behalf of the valuation officer can be stated briefly, but none the less forcefully, thus:—

It is said: true the Act of 1902 gave to the local authority a power to acquire land for a crematorium in addition to its pre-existing power to acquire land for burial grounds, but there is nothing sufficient to justify the conclusion that by a side-wind, so to speak, the rating concession of section 15 of the Burial Act, 1855, is thereby extended to apply to land acquired for crematoria purposes.

When Mr. Lyell put the argument to us I confess that I found it impressive; but, on the whole, I have reached the conclusion that the answer put to us by Mr. Rowe is that which we should accept, and I am comforted by this consideration, that the view which Mr. Rowe has put forward has commended itself both to the local valuation court and to the Lands Tribunal.

The point being short, I shall state my reasons shortly. I base them in the end of all upon the language of section 4 of the Act, 1902, when I examine it closely. Let me read the relevant words once again: "The powers of a burial authority "to provide . . . burial grounds . . . shall be deemed to extend "to . . . the provision of crematoria." Observe that there is no express addition to the powers. The section does not say that in addition to the powers to provide burial grounds there shall be conferred powers to provide crematoria. It does not even say in terms that the powers to provide burial grounds should be deemed to include powers to provide crematoria. What it says is that powers to provide burial grounds shall be deemed to include provision of crematoria; in other words, it is, as I read it, saying that the justification for the purchase of land for crematoria shall be the invocation of the pre-existing power (which remains) to provide burial grounds. The power which is exercised is the same power.

What Parliament has done is to say that that power shall be deemed to be applicable to the case of provision of crematoria. If that is so, then when I come back to section 15 of the Act of 1855 and ask under what power the land here in question was provided—the answer is, it was provided pursuant to the burial-ground-providing power.

"No land acquired under the provisions of any of the Acts "herein-before recited for the purpose of a burial ground . . ." The provisions of the Act invoked were those very provisions of section 26 of the Act of 1852. The power used was the power to provide land for a burial ground. But as a result of the Act of 1902 that power was available for the acquisition of this land although it was for use as a crematorium and not as a burial ground.

There remains the point Mr. Lyell made, that two conditions are requisite for the rating concession: not only must the land have been acquired under the provisions of what I call the burial-ground-providing Act, but the land must be used for (and I am quoting) "such purposes." I think the plural, "such purposes" introduces what might be called ancillary or comparable purposes; but however that may be, I think that if by reason of my reading of section 4 of the Act of 1902 I am justified in inserting, by way of expanding periphrasis, into section 15 after the words "burial grounds" the words, "which shall be deemed to include "a crematorium," then one provides at the same time the answer to the question: is the second condition also satisfied?

That is the way in which the president of the Lands Tribunal formulated his conclusion. In paragraph 14 he quoted the argument of the respondent, which he accepted, as follows: "He," counsel for the council, "submitted that when you read section 4 "of the Cremation Act back into section 15 of the Burial Act, "you can read it," that is the latter, "as meaning, 'No land "'already or to be hereafter purchased or acquired, under the "'provisions of the Burial Acts for the purpose of a burial "'ground, a phrase which shall be deemed to include the pro-"'vision and maintenance of a crematorium with or without "'any building,'" etcetera, "'may be assessed to any rate,'" and so on.

The only divergence which, I think, I would make from that exposition is this. I am not so much reading section 4 into section 15, but, in the light of section 4, I am asking the question as regards the land here: under section 15 of the Act of 1855, has this land been acquired pursuant to what I have called the burial-ground-providing provisions of the Act of 1852? And I answer that question: it has. Having so answered it, I think the way in which the matter is then formulated by the president was justified. I should not, I think, wish to adopt for the purposes of my judgment the later paragraphs of the decision which do not to my mind add anything to the main point.

For the reasons I have given and which the president of the Lands Tribunal gave, I think this appeal should be dismissed.

MORRIS L.J. I entirely agree and I do not desire to add anything.

PEARCE L.J. I agree with what my Lord has said.

Appeals dismissed.
Leave to appeal to House of Lords.

Solicitors: *Solicitor of Inland Revenue; R. H. Jerman, Town Clerk, Wandsworth; Sharpe, Pritchard & Co. for S. J. Harvey, Town Clerk, Camberwell.*

E. D.

RUSSELL v. SMITH.

1957
July 10, 11.

Lord Goddard C.J., Slade and Gorman JJ.

Criminal Law—Larceny—"Takes"—Under mistake—Excess goods loaded onto lorry—Excess only discovered on delivery—Misappropriation—Larceny Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 1 (1), (2) (i).
Judicial Precedent—Court of Criminal Appeal decision—Binding on Divisional Court.

S. was employed as a lorry driver by T., a firm of haulage contractors. He was instructed by the firm to collect from C. Ltd. and deliver to J. one ton of feeding stuffs. By an error on the part of C. Ltd. eight sacks too many were loaded onto the lorry. Although S. arranged the load, he did not know that he had more sacks than he should have had until the time of delivery, whereupon he decided to appropriate the excess for himself:—

Held, that there was a "taking" of the sacks within section 1 of the Larceny Act, 1916, when S. discovered that he had the sacks, which he must have known were never intended to be given to him, and decided to appropriate them.

[Reported by DAVID CALCUTT, Esq., Barrister-at-Law.]

Rex v. *Hudson* [1943] K.B. 458; 59 T.L.R. 250; [1943] 1 All E.R. 642 applied.

Moynes v. *Coopper* [1956] 1 Q.B. 439; [1956] 1 All E.R. 450 distinguished.

CASE STATED by the Somerset justices, sitting at Wiveliscombe.

On January 21, 1957, an information was preferred by the appellant, Kenneth Ernest George Russell, an inspector of police, against the respondent, Alec Ralph Smith, alleging that in September, 1956, the respondent stole eight half hundredweight sacks of pig meal, valued at £7 1s. 2d., the property of Crosfields & Bodey Ltd. (hereinafter called " Crosfields ").

The justices heard the information on February 14, 1957, and found the following facts: The respondent was, on September 12 and 13, 1956, employed as a lorry driver by Tone Vale Transport Co. Ltd., general haulage contractors, carrying on business at Wiveliscombe, Somerset. On September 12, 1956, the respondent was instructed by his employers to go to Bristol and collect, inter alia, one ton of feeding stuffs . . . [in half hundredweight sacks] from the premises of Crosfields & Bodey Ltd. . . . These feeding stuffs were for delivery to Geoffrey Harold Jennings . . . of Crowcombe, Somerset. The respondent had been given by his employers a written and signed delivery order for one ton of feeding stuffs—which he handed to the foreman of Crosfields, who had authority to hand over goods on his employers' behalf. The contract between Tone Vale Transport Co. Ltd. and Crosfields was that Tone Vale Transport Co. Ltd. should carry the feeding stuffs for Crosfields and deliver the same to Jennings and that Tone Vale Transport Co. Ltd. should be paid at a rate per ton for the goods transported. Payment was made for this particular transaction by Crosfields to Tone Vale Transport Co. Ltd. in respect of one ton. By an error on the part of Crosfields there was loaded onto the lorry of the respondent on September 12, 1956, an extra batch of eight half hundredweight sacks of pig meal in addition to the authorized consignment of one ton. The sacks were brought by employees of Crosfields from the warehouse and dropped through a chute onto the lorry. The respondent remained on the back of the lorry to arrange the load and while he was aware of the nature of the load he did not count the number of sacks nor did he know that an extra batch of sacks were on his lorry. After the loading had been completed the respondent signed an invoice from Crosfields acknowledging the receipt by him of one ton of feeding stuffs only. The respondent drove his lorry from Bristol to Crowcombe. When unloading the sacks of feeding stuffs at the premises of Jennings the respondent discovered for the first time that eight extra sacks had been loaded on the lorry at Crosfields' mill. The respondent then decided to keep the eight sacks for himself although he knew that he had no right to them.

It was contended by the appellant that the property in the eight excess sacks had at no time passed from Crosfields to the respondent. If the respondent had no knowledge of the goods at the time of taking, he could not be said to have "taken" them within the meaning of section 1 of the Larceny Act, 1916.[1] The "taking" came at the time of unloading, and since it was animus furandi the respondent was guilty of larceny.

It was contended by the respondent that he was the innocent recipient of a chattel; and that subsequent fraudulent misappropriation could not amount to larceny. It could not be said that the respondent was either the servant of Crosfields or the bailee in respect of the excess sacks: the contract of bailment was confined to the one ton of feeding stuffs.

The justices were of the opinion that there was no "taking" sufficient to amount to larceny since the "taking," in their opinion, took place at the time of the loading of the eight excess sacks, and at that time the respondent did not have the intent permanently to deprive the owner thereof. Accordingly, they dismissed the information.

E. L. Gardner for the appellant. The respondent did not know that he had eight sacks too many on his lorry until the time of delivery. It was then that he decided to appropriate the excess. His appropriation constituted the "taking" within the meaning of section 1 of the Larceny Act, 1916. Since his "taking" was animus furandi, the respondent was guilty of larceny. The present case is distinguishable from *Moynes* v. *Coopper*,[2] since in *Moynes'* case [2] the "taking" was not animus furandi.

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[1] Larceny Act, 1916, s. 1: ". . . "(1) a person steals who, without the "consent of the owner, fraudulently "and without a claim of right made in "good faith, takes and carries away "anything capable of being stolen "with intent, at the time of such "taking, permanently to deprive the "owner thereof . . . : (2)—(i) the "expression 'takes' includes obtaining the possession—(*a*) by any trick; "(*b*) by intimidation; (*c*) under a "mistake on the part of the owner "with knowledge on the part of the "taker that possession has been so "obtained . . ."

[2] [1956] 1 Q.B. 439; [1956] 1 All E.R. 450.

J. A. S. Hall for the respondent. When the sacks were loaded onto the lorry, the consignors gave up possession of them. They intended to part with the sacks with which they did in fact part, although they may not have intended to part with eight sacks in excess of the contract. The respondent had knowledge of each sack which had been loaded onto the lorry; what he did not know was that there were eight sacks in excess of the contract. This case is therefore distinguishable, on the facts, from *Reg.* v. *Riley* [3] and *Rex* v. *Hudson.*[4]

Possession in each and all of the sacks on the lorry therefore passed at the time of loading, either to the respondent or to his master. Prima facie, as between master and servant, possession would pass to the master: *Rex* v. *Harding* [5] and *Rex* v. *Abrahat.*[6] But since here there were eight sacks loaded in excess of the contract, possession in the excess would not pass to the master, because the excess formed no part of the contract: *Meux* v. *Great Eastern Railway Co.*[7] and *Reg.* v. *Cullum.*[8] Possession of the excess must therefore have been in the respondent. Since the "taking" of the excess was not animus furandi, the respondent was not guilty of larceny.

Lord Goddard C.J. This case stated by justices for the county of Somerset raises yet another difficult question with regard to the law of larceny, a law which is exceedingly technical and which has been the subject of a great many decisions. The court is indebted to Mr. Hall for a very careful argument in this case; and I would also pay a tribute to the magistrates, who evidently tried this case with great care, applied their minds to the right points and submitted to the consideration of no fewer than 15 cases which were cited to them, the earliest of which was decided in 1798, the most recent in 1956. The justices seem to have entirely appreciated the point, which was whether there was here a felonious taking; and it is no reflection upon them that we are taking a view different from that which they took.

This is in some respects a difficult case. One of the cases which was cited to the justices, and which we shall have to consider, was *Moynes* v. *Coopper*,[1] decided in this court in 1956.

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[3] (1853) Dears.C.C. 149; 22 L.J. M.C. 48.

[4] [1943] K.B. 458; 59 T.L.R. 250; [1943] 1 All E.R. 642.

[5] (1807) Russ. & Ry. 125.

[6] (1798) 2 Leach 824.

[7] [1895] 2 Q.B. 387; 11 T.L.R. 517.

[8] (1878) L.R. 2 C.C.R. 28.

[1] [1956] 1 Q.B. 439; [1956] 1 All E.R. 450.

It was said of that case in 72 Law Quarterly Review, p. 183, that it "does serve to emphasise the utter unreality of the present law "of stealing. [Such cases] are a public scandal both because "the courts are reluctantly compelled to allow dishonesty to go "unpunished, and because of the serious waste of judicial time "involved in the discussion of futile legal subtleties." Those are strong words, no doubt; but it would be a good thing, I think, if the law of larceny could be somewhat simplified and cleared up.

The facts of the present case are in quite a small compass. The respondent was a lorry driver in the employ of a firm of cartage contractors. He was sent by his employers to the mills or factory of a firm called Crosfields & Bodey Ltd., there to load a cargo of pig meal and drive it to a merchant living at Crowcombe in Somerset. Jennings, the merchant, had bought this pig meal from Crosfields. Crosfields employed the respondent's masters to transport the goods. The respondent went to Crosfields, and stood by or on the lorry while it was loaded. By some mistake, probably in counting, eight half hundredweight sacks too many were put onto the lorry. Nobody knew that the excess had been put onto the lorry; nobody intended that the excess should be put onto the lorry. The respondent then drove to Jennings' establishment. He knew how many sacks he had to deliver to Jennings; Jennings knew how many sacks he was to receive; and Jennings received that number. There were eight sacks left in the lorry, because of the excess which had been put onto it. That was the first time that the respondent knew that he had more sacks than he ought to have had. Thereupon he formed the intention—the question is whether it was a felonious intention—of appropriating those sacks, which he did; and he took them away and sold them. When these circumstances came to light he was charged with feloniously stealing the sacks.

The justices, having considered those facts, said: "We were "of the opinion . . . that there was no 'taking' sufficient to "amount to larceny, since at the time of the taking of the "eight half hundredweight sacks the respondent did not then "have the intent permanently to deprive the owner thereof. "Accordingly, although we felt that the respondent was guilty of "grave dishonesty (as we so stated at the time), we dismissed "the information." To my mind the whole essence of the case depends upon when a man can be said to take the particular articles which he is charged with stealing. We do not, of course.

throw any doubt upon the proposition that if a person takes property innocently and without any felonious intention and subsequently appropriates it to his own use, that is not, according to the present state of the law, larceny. The taking must be animo furandi.

The Larceny Act, 1916, which, as I pointed out in *Moynes* v. *Coopper*,[2] was intended to codify not only the statute law but also the common law on the subject, does not give a comprehensive definition of the word "takes": I dare say it would have been impossible so to do. Having given the well-known definition of larceny, section 1 (2) (i) provides: "the expression 'takes' "includes obtaining the possession—(*a*) by any trick; (*b*) by "intimidation; (*c*) under a mistake on the part of the owner "with knowledge on the part of the taker that possession has "been so obtained; . . ." That, it is to be observed, says what "taking" includes, but it may include other things. I can certainly say, in favour of Mr. Hall's argument, that it cannot be said in this case that the respondent obtained possession of the goods "under a mistake on the part of the owner with "knowledge on the part of the taker that possession had been so "obtained," because neither of them knew at the time that possession of these eight sacks had been parted with by the owners and put on the lorry. It was not until the lorry was unloaded that this man became aware (Crosfields, of course, at this time were not aware) that eight sacks too many had been put on the lorry. He then formed the intention to appropriate these eight sacks; and that was the first time he could have formed the intention, because until that time he did not know that he had eight sacks more than he ought to have had. It is perfectly true that he knew that he had the actual sacks when he drove off from Crosfields, but so far as he knew, those were the sacks which he had to deliver to Jennings. He could not, therefore, form an intention until he knew that he had in his lorry eight sacks more than he ought to have had.

The facts in *Moynes* v. *Coopper*,[3] which has been considerably canvassed, were these. There was a pay clerk who had authority not only to pay wages, but also to calculate the wages which were due to particular employees. On one occasion she miscalculated the amount, but intended that the sum which she calculated should be given to a certain workman as his wages. She sent him the wages in a pay packet. When he received the packet he did not open it but put it in his pocket; he received what the clerk intended him to receive. It was not that the clerk put some money into the packet by mistake, thinking, for instance, that she had put in £5 when in fact she had put in £6; she put in what she did deliberately, thinking that that was the amount of money that she was obliged to pay to this man on that day; and he took it without knowing that more was in that packet than there ought to have been. Consequently we held in that case that the taking was an innocent taking, because what he took was what the clerk meant him to take; and therefore, although he acted dishonestly by misappropriating the money when he discovered what had happened, he was not guilty of larceny. We distinguished that case from *Rex* v. *Hudson*,[4] which being a decision of the Court of Criminal Appeal is, I think, binding on this court, as indeed it would have been if it had been a decision of the Divisional Court.

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[2] [1956] 1 Q.B. 439, 444.

[3] [1956] 1 Q.B. 439.

The headnote in *Rex* v. *Hudson* [4] reads as follows: "The "appellant received a letter which was intended for someone else. "He kept it for some days, and then, on opening it, he found "inside a cheque, inadvertently made out in his name, which "he thereupon appropriated to his own use:—*Held*, that, "although, when the letter was delivered to the appellant, he "had no animus furandi with regard to the contents, he was "properly convicted of larceny." He received it innocently in the sense that it came to him through the post.

In giving the judgment of the court,[5] the court considered *Reg.* v. *Ashwell*,[6] which has always been regarded as a most unfortunate case because it was argued before 14 judges, seven of whom decided one way and seven the other. It is an instance of how one should always be careful to have an uneven number of judges in the court. The court approved [7] the judgment of Cave J.,[8] part of which reads: "In my judgment a man cannot "be presumed to assent to the possession of a chattel; actual "consent must be shewn. Now a man does not consent to that "of which he is wholly ignorant; and I think, therefore, it was "rightly decided that the defendant in *Merry* v. *Green* [9] was "not in possession of the purse and money until he knew of "their existence." Stephen J. said [10]: "If a man picks up a "purse containing money some seconds must usually pass before

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[4] [1943] K.B. 458; 59 T.L.R. 250; [1943] 1 All E.R. 642.

[5] [1943] K.B. 458, 459.

[6] (1885) 16 Q.B.D. 190; 2 T.L.R. 151.

[7] [1943] K.B. 458, 460.

[8] 16 Q.B.D. 190, 203.

[9] (1841) 7 M. & W. 623.

[10] 16 Q.B.D. 190, 216.

"he can open the purse and discover and determine to appropriate the money. I think, however, that for legal purposes "it is neither possible nor desirable to attempt to go into such "a refinement as this. If a man finds a purse, picks it up, "opens it, finds money in it, and thereupon determines to keep "it for himself, it appears to me that the whole process ought "to be regarded as one action, taking place at one time, as for "many purposes the fractional parts of a day are not regarded "by the law."

Then the judgment in *Reg.* v. *Hudson* [11] goes on to deal with the particular facts in that case: "The appellant received an "envelope. What he did with it for some days was not disclosed by the evidence. Eventually he opened the envelope "and he discovered the cheque, a thing which was palpably "valuable and which equally palpably belonged to someone else. "At that moment, for the first time, he was in a position—in "which he had not been before—to form an intent. In effect, "he said then and there: 'I am going to appropriate and take "'away from the owner property which he does not intend to give "'me and which I do not intend to return to him, but of which "'I do intend permanently to deprive him.' That appears to "me to come within the words of Lord Coleridge C.J. in *Reg.* "v. *Ashwell*,[12] where he says: 'In good sense it seems to me "'he did not take it till he knew what he had got; and when he "'knew what he had got, that same instant he stole it.' That "is what the appellant did in this case. As soon as he saw "what he had got, he made up his mind to steal it. He then "did all that was necessary for him to complete the offence of "larceny."

In my judgment that case is applicable here and is binding upon this court. The respondent did not know what he had until, by the emptying of the lorry at the buyer's premises, he found he had eight sacks too many. He was never intended to have eight sacks too many and he never intended to take eight sacks too many. He was intending to take the consignment, which the buyer had ordered, into the possession of the buyer. When he found that he had more than he ought to have had, then, for the first time, he became aware of the mistake which had been made and of the addition that had been made. I do not think that a man can take into his possession, or come into possession of, a thing of which he has no knowledge. If somebody leaves something in my house and I do not know that he has left it, it does not seem to me that it can be said that I am in possession of that property. If it happens to be stolen goods —leaving out any question of guilty knowledge—the prosecution would surely fail at once, if it was once shown that the property was left in my house without my knowledge. Very often the prisoner in a receiving case alleges that he did not know that the goods were there. If the respondent did not know that the goods were there, how can he be said to be in possession of them?

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[11] [1943] K.B. 458, 461.

[12] 16 Q.B.D. 190, 225.

In giving judgment in *Moynes* v. *Coopper*,[13] I considered *Rex* v. *Hudson*[14] and said: " Before parting with the case, we ought " to refer to *Rex* v. *Hudson*,[14] on which the prosecution placed " reliance. That case has been the subject of a good deal of " criticism, see, for instance, Russell on Crime, 10th ed. (1950), " Vol. 2, pp. 1158–1161, as to whether the charge ought not to " have been for obtaining an altered cheque by false pretences; " the appellant had certainly been guilty of some crime. He was " charged with stealing a cheque which had come to him by post " and was intended for another person of the same surname, but " there was no initial either on the envelope or cheque. The " accused, knowing that the cheque was not intended for him, " got the drawer to insert his initial on the cheque, which he " kept and cashed. This would seem to be closely akin to stealing by finding, as when he found the cheque in the envelope, " he could easily have discovered the true owner. But in our " opinion it is not an authority for the present case, as in " *Hudson's* case[14] neither the cheque nor the envelope was " intended by the sender for the accused."

That is the reason why *Hudson's* case[14] was decided as it was: neither the cheque nor the envelope was intended by the sender for the accused. In the present case these eight sacks were not intended to be put into the respondent's lorry; they were not intended to be delivered to the consignee when the rest of the property was delivered. I think it is very much akin to a finding. If a person by inadvertence places sacks in a lorry, it is not very much different from having lost the sacks. In my opinion, therefore, there was a taking. The taking took place when this man discovered that he had the sacks, which were never intended to be given to him and which he must have known were never intended to be given to him, except in the sense that they were put on the lorry by mistake.

[13] [1956] 1 Q.B. 439, 445.

[14] [1943] K.B. 458.

For these reasons I think there was a "taking" here and the case must go back to the magistrates with a direction that an offence was committed and that it is their duty to convict.

Slade J. I agree, and I should like to associate myself with the tribute which the Lord Chief Justice has paid to the magistrates for the care with which they heard the case and with which they have stated this case. Although we are differing from them, I confess that my own mind has wavered more than once in the course of the argument, and for that I am indebted to the way in which Mr. Hall has put the argument before us. I think the case is covered by the decision of the Court of Criminal Appeal in *Rex* v. *Hudson* [14] and I agree with my Lord's judgment and the reasons he gave.

Gorman J. I agree, and I do not desire to add anything.

Appeal allowed.

Solicitors: *Reed & Reed for Clarke, Willmott & Clarke, Taunton; McKenna & Co. for Moger, Couch & Ligertwood, Wiveliscombe.*

[14] [1943] K.B. 458.

1957
July 11.

Lord Goddard C.J., Slade and Gorman JJ.

REGINA *v.* DERBY BOROUGH JUSTICES' CONFIRMING AUTHORITY. *Ex parte* BLACKSHAW.

Licensing—Justices—Jurisdiction—Confirming authority—Removal of licence—Removal granted subject to confirmation—Death of licensee —Right of executrix to confirmation—Licensing Act, 1953 (1 *&* 2 *Eliz.* 2, *c.* 46), *ss.* 22, 25.

S. was the holder of a justices' off-licence. She applied for, and was granted, subject to confirmation, a removal of the licence to other premises. Before the licence was confirmed S. died, and her executrix applied to the confirming authority for confirmation. The authority held that the death of S. deprived them of jurisdiction:—

Held, that the licence having come into existence before the death of S., it remained so after her death; and that since an

[Reported by David Calcutt, Esq., Barrister-at-Law.]

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order for removal had been made by the justices, the confirming authority had jurisdiction to consider the application of the executrix.

M'Donald v. *Hughes* [1902] 1 K.B. 94; 18 T.L.R. 79 and *Cooke* v. *Cooper* [1912] 2 K.B. 248 applied.

APPLICATION for mandamus.

Harriett Short was the holder of a justices' licence for the sale of wines and spirits off the premises at 62, Green Lane, Derby. On February 7, 1957, Mrs. Short applied to the justices for an order for the removal of the off-licence to 97, Normanton Road, Derby, and her application was granted subject to confirmation.

On March 8, 1957, Mrs. Short died. She had, by her will, appointed the applicant, Sophia Blackshaw, her executrix. On March 29, 1957, the applicant applied to the confirming authority of the borough of Derby licensing justices for confirmation of the order for removal.

The chairman of the confirming authority, whilst intimating that the authority would have confirmed the order on the merits of the case, said that the authority was unable to adjudicate upon the application, on the ground that the death of Mrs. Short deprived the authority of jurisdiction.

Richard Elwes Q.C. and *H. G. Talbot* for the applicant. A licence which is in existence at the death of the licensee does not necessarily die with him. It remains in existence for certain purposes for a certain time: *M'Donald* v. *Hughes*[1] and *Cooke* v. *Cooper*.[2] The licence held by Mrs. Short was in existence at her death, and it remained in existence thereafter to enable her executrix to apply, within a month of death, for confirmation of the removal order. The confirming authority therefore had jurisdiction to consider the application of the executrix.

The respondents did not appear and were not represented.

LORD GODDARD C.J. Mr. Elwes moves for an order of mandamus to the confirming authority for the Borough of Derby to hold a meeting and consider an application for confirmation of an order of removal of an off-licence which was in existence for 62, Green Lane, Derby. The point which arises is that Harriett Short, who was the holder of the justices' off-licence at 62, Green Lane, and who was in fact the manageress of a company which

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[1] [1902] 1 K.B. 94; 18 T.L.R. 79.

[2] [1912] 2 K.B. 248.

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owned the property, applied on February 7, 1957, to the licensing justices for an ordinary removal of the licence to 97, Normanton Road, Derby. The application was granted subject to confirmation.

Before the confirming authority met, Mrs. Short died, and her executrix, the applicant, Sophia Blackshaw, appeared at the confirming authority's meeting on March 29, 1957, and applied for confirmation of the order of removal. The justices said that they would have granted it, so Mr. Elwes (who was present) tells us, but they considered that they had no jurisdiction; and the justices have not put before this court any affidavit setting out why they considered that they had no jurisdiction. It would have been helpful to the court if they had, because they probably have a good deal of experience in these cases, and we should have liked to have known the reason why the justices held that they had no jurisdiction. As they have neither filed an affidavit nor appeared before us, it is reasonable to suppose that they have come to the conclusion that they were wrong. But that is not good enough for us; we must see that they were, in fact, wrong before we grant mandamus.

Meanwhile, the applicant, we are told, has been to the transfer sessions and has had the licence transferred to her; but that was after the date of the meeting of the confirming authority and, of course, neither the owners of the property nor the applicant wish to have to wait until next year when the confirming authority meet again—they only meet once a year—before they can have the removal order confirmed.

Section 25 of the Licensing Act, 1953, deals with cases of ordinary removal and provides that the "application shall be "made by the person wishing to hold the licence after removal"; and it provides for the applicant to give certain notices. Section 25 (4) provides: "The justices shall not grant an ordinary "removal unless they are satisfied that no objection to the "removal is made—(*a*) where the licence is a justices' on-licence, "by the owner of the premises from which it is sought to remove "the licence or the holder of the licence; (*b*) where the licence "is a justices' off-licence, by the holder of the licence"—of course, there is no objection of that kind, because the holder of the off-licence is applying—"or by any person other than the "owner of the said premises and the holder of the licence, or, "as the case may be, other than the holder of the licence, whom "the justices consider to have a right to object to the removal." There was no objection in this case. Section 25 (5) provides: "Subject to the preceding provisions of this section, licensing "justices shall have the same power to grant an ordinary removal "as they have to grant a new justices' licence." That means that the justices must take into consideration the same things as they would if a new licence was being applied for, and, in particular, whether there is a sufficiency or a deficiency in the licensed premises in the district to which it is suggested the licence should be removed. Those are considerations for the licensing authority, and no doubt the confirming authority can take into account the same matters.

Section 22 provides: "Where the holder of a justices' licence "dies . . . section 120 of this Act shall not prohibit the sale or "exposure for sale of intoxicating liquor by the personal repre-"sentatives . . . during a period ending with the next transfer "sessions, or, if the next transfer sessions are held within "fourteen days after the death . . . the next transfer sessions "but one"; in other words, that shows that the licence is kept alive and the executors have a right to go to the next transfer sessions and have the licence transferred either to one of the executors or to anyone whom the executors bring forward as a person to whom the transfer should be granted.

It has been held that, if a person applies to licensing justices for the grant of a new licence and before that licence has been confirmed the applicant dies, the executors cannot apply for confirmation of that licence because there never was a licence in existence; the licence would only come into existence on confirmation. The question we have to decide is whether we can apply that principle to a case of an application for the removal of an existing licence. In *M'Donald* v. *Hughes*[1] a licensed person died and the executrix was continuing to carry on the premises under the provisions of section 3 of the Licensing Act, 1872, which corresponds in most respects with section 22 of the Licensing Act, 1953; at any rate it enabled the executors to carry on. A police raid took place on the premises, and there was a prosecution of the executrix for permitting gaming on the premises; but it was objected that she was not a licensed person. The court considered that she stood in exactly the same position as the licensed person. Lord Alverstone C.J., in giving judgment, said[2]: "In my opinion, after the death of a person holding "such a licence, the licence continues to exist for a certain time, "provided that the representatives of the licensed person come "to the next special sessions (held more than fourteen days after "the death of the licensed person) for a licence; and the effect

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[1] [1902] 1 K.B. 94; 18 T.L.R. 79.

[2] [1902] 1 K.B. 94, 96.

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"of the interpretation clause is to say that the representative of "the deceased person is entitled to act as if he or she were a "licensed person during that period—that is to say, as if he or "she were holding the licence."

Mrs. Short died on March 8, 1957, and the application was made to the confirming authority within 15 days thereafter; but the licence has not been transferred.

In *Cooke* v. *Cooper*,[3] in which the right of an executrix of a licensee to continue an appeal against the refusal of justices to renew a licence was considered, Lord Alverstone C.J. said[4]: "There is no reason why this case should not go back to the "justices to be dealt with. The case is governed by the principle "of the decision in *M'Donald* v. *Hughes*.[5] On the death of a "licence holder the licence is not absolutely void. It remains "in existence for the purposes of the representatives of a deceased "licensee getting a renewal in his place, and being held liable if "they carry on the business in breach of the Licensing Acts. "In my opinion this licence remains in existence for the purpose "of enabling the representatives to maintain this appeal." The court was not saying that the licence only existed for the purpose of enabling the representative to obtain a transfer: it enabled them to maintain an appeal, because an appeal was for the protection of the licence and the licence was still in existence.

Different considerations apply if a new licence has not been confirmed so that the licence never comes into existence; but the principle in *Cooke* v. *Cooper*[6] is sufficient to support the argument of Mr. Elwes that, the licence being still in existence and an order having been made by the licensing justices that it should be removed, the confirming authority can consider, on the application of the executrix, the application for confirmation.

For these reasons, in my opinion, the order of mandamus should go.

SLADE J. The only doubt I have felt in this case arose from the fact that not only has the court not had the benefit of any argument on behalf of the confirming authority, but to this moment the court does not know the ground upon which the confirming authority declined jurisdiction. Lord Goddard C.J. has already recited the facts, and the position is that, without applying for any transfer of the licence to the personal representative of the deceased licensee, the personal representative applied for confirmation to the confirming authority after the licensee, during her lifetime, had in fact obtained an order for removal. It is possible that the confirming authority may have taken the view, rightly or wrongly, and declined jurisdiction because they felt that the licence remained in force upon the death of a licensee for the benefit of the licensee's personal representative only for the purpose of securing a transfer of the licence to the personal representative. That, of course, would be a licence in respect of the premises for which the licence was granted and not a removal, which postulates a licence for some other premises.

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[3] [1912] 2 K.B. 248.

[4] Ibid. 250.

[5] [1902] 1 K.B. 94.

[6] [1912] 2 K.B. 248.

I cannot speculate on that. I merely say that I felt doubt because I do not know the grounds upon which the confirming authority acted, although I am quite satisfied that they would not decline jurisdiction capriciously or arbitrarily. In the absence of any argument of that kind, I am certainly not prepared to dissent from a judgment which holds that the principle in *Cooke* v. *Cooper*[7] applies to a case of this kind, particularly as I realize the grave injustice which might operate on the personal representative and, therefore, on the estate of the deceased licensee, in that, having regard to the fact that the next transfer sessions is a long way ahead, they were precluded from taking some steps for removal; and in this case I understand the lease has expired through effluxion of time. I therefore agree.

GORMAN J. I agree with my Lords, and would add that in the statement which was filed pursuant to R.S.C., Ord. 59, it appears that the chairman of the confirming authority, whilst intimating that the confirming authority "would have confirmed "the said order on the merits of the case, refused to adjudicate "upon the said application on the ground that they had no "jurisdiction to do so by reason of the death of the said Harriett "Short"; and it seems to me that what the confirming authority were saying there was that they could not confirm this removal because the death of the licensee had, in law, affected the position as far as seeking confirmation of that removal was concerned.

On the authorities here, it is quite clear that that is not right. By section 22 of the Licensing Act, 1953, certain powers are given to an executor of a deceased licensee during the period up to the holding of the next transfer sessions or the next transfer sessions but one. I feel it is not without importance to point out that the confirming authority in this case met before the expiry of that time; and in *M'Donald* v. *Hughes*[8] Lord Alverstone C.J. said[9]: "In my opinion, after the death of a person holding such a "licence, the licence continues to exist for a certain time"; and, therefore, there is no question in the present case of default (if that is the correct word) in the making of an application by the executrix of the licensee before there has been a meeting of the next transfer sessions or the next transfer sessions but one. It was held both in *M'Donald* v. *Hughes*[10] and in *Cooke* v. *Cooper*,[11] as my Lord pointed out, that certain powers were conferred upon the executrix of the licensee.

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[7] [1912] 2 K.B. 248.

No case has been cited in which the position arising on an application for a removal of a licence has been specifically considered, but there are passages in *M'Donald* v. *Hughes*[12] and *Cooke* v. *Cooper*[13] which, in my view, make it clear that it is within the authorities to say that the executrix has the right to apply for confirmation of the removal of the licence. The first passage occurs in *M'Donald* v. *Hughes*[14] where Lord Alverstone C.J. said[15]: "In my opinion, a person "holding the licence till the next special sessions after the death "of the licensee is a licensed person within the meaning of the "Act"; and the second occurs in *Cooke* v. *Cooper*[16] where Lord Alverstone C.J. said[17]: "On the death of a licence holder the "licence is not absolutely void. It remains in existence for the "purposes of the representatives of a deceased licensee getting "a renewal in his place, and being held liable if they carry on "the business in breach of the Licensing Acts. In my opinion, "this licence remains in existence for the purpose of enabling "the representatives to maintain this appeal."

Although there is no case exactly in point, that which has been held in those two cases makes it clear that one is not going outside them in saying there is the same power in the personal representative of the deceased licensee making application for the confirmation of a removal, a removal already having been sanctioned by the justices. That being so, I agree completely with what my Lords have said.

Application granted.

Solicitors: *Corbin, Greener & Cook for Blackhurst, Parker & Co., Preston.*

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[8] [1902] 1 K.B. 94.
[9] Ibid. 96.
[10] Ibid. 94.
[11] [1912] 2 K.B. 248.
[12] [1902] 1 K.B. 94.
[13] [1912] 2 K.B. 248.
[14] [1902] 1 K.B. 94.
[15] Ibid. 97.
[16] [1912] 2 K.B. 248.
[17] Ibid. 250.

REGINA *v.* DEPUTY CHAIRMAN OF THE COUNTY OF LONDON QUARTER SESSIONS APPEALS COMMITTEE. *Ex parte* BORG.

1957
July 16, 19.

Lord Goddard C.J., Byrne and Devlin JJ.

Justices—Appeal to quarter sessions—Jurisdiction—Summary offence before metropolitan magistrate—Plea of guilty—Right of appeal against conviction—" Person . . . aggrieved "—Metropolitan Police Courts Act, 1839 (2 *&* 3 *Vict. c.* 71), *s.* 50.

B. was summoned before a metropolitan magistrate for certain alleged offences in connexion with the keeping of a brothel. She consented to summary trial, pleaded guilty, and was convicted. She appealed against her conviction to quarter sessions. Quarter sessions held that since B. had pleaded guilty at her trial, they were without jurisdiction:—

Held, that a person who deliberately pleaded guilty to a summary offence before a metropolitan magistrate could not be said to be a person " aggrieved " by his conviction within section 50 of the Metropolitan Police Courts Act, 1839,[1] so as to give him a right of appeal; accordingly, quarter sessions had no jurisdiction to entertain B.'s appeal.

Mittelmann v. *Denman* [1920] 1 K.B. 519; 36 T.L.R. 141 explained.

APPLICATION for order of mandamus.

On June 13, 1957, the applicant, Lillian Mary Borg, was summoned before a metropolitan magistrate sitting at the Marlborough Street Magistrates' Court for being in occupation of certain premises and knowingly permitting them to be used as a brothel, contrary to section 35 of the Sexual Offences Act, 1956, and for permitting certain children to reside in the brothel, contrary to section 3 of the Children and Young Persons Act, 1933. The applicant consented to summary trial on the charges preferred under the Children and Young Persons Act, 1933; and pleaded guilty to all the offences for which she was summoned. The magistrate sentenced the applicant to a fine of £100 and six months' imprisonment.

[Reported by DAVID CALCUTT, Esq., Barrister-at-Law.]

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[1] Metropolitan Police Courts Act, 1839, s. 50: " In every case of sum-" mary order or conviction before any " [metropolitan magistrate], in which " the sum or penalty adjudged to be " paid shall be more than £3, or in " which the penalty adjudged shall " be imprisonment for any time more " than one calendar month, any " person who shall think himself " aggrieved by the order or convic-" tion may appeal to . . . quarter " sessions . . ."

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On June 17, 1957, the applicant gave notice of appeal against her conviction to quarter sessions; and on June 25, 1957, the appeal came on for hearing. It was submitted that since the applicant had pleaded guilty before the metropolitan magistrate the appeals committee had no jurisdiction to hear an appeal against conviction. The committee accepted the submission.

H. S. Grannum for the applicant. Although the applicant pleaded guilty, she has, by virtue of section 50 of the Metropolitan Police Courts Act, 1839, a right of appeal against her conviction before the metropolitan magistrate. It is clear from *Moseley* v. *Director of Public Prosecutions* [2] and from *Mittelmann* v. *Denman* [3] that section 50 of the Act of 1839 was unrepealed in 1920; and it is equally clear from *Rex* v. *London Quarter Sessions, Ex parte Bowes* [4] and from *Cockhill* v. *Davies* [5] that it has remained so since that date. The right of appeal given by section 36 of the Criminal Justice Act, 1948,[6] did not affect section 50 of the Act of 1839: generalia specialibus non derogant: *Walker* v. *Hemmant*.[7]

Bernard Caulfield for the respondent. A person who has pleaded guilty cannot consider himself aggrieved by the conviction (although he may consider himself aggrieved by the sentence). By pleading guilty he invites a conviction. In 1920 no general right of appeal, even against sentence, was available to a person who had pleaded guilty; it was, however, available by statute in certain exceptional circumstances: section 50 of the Metropolitan Police Courts Act, 1839, is an example. But a right of appeal against conviction has never been available to a person who has pleaded guilty; and such a right of appeal was never considered in *Mittelmann* v. *Denman*.[8] Section 50 of the Metropolitan Police Courts Act, 1839, must be interpreted in its historical context. To attribute to the legislature an intention to give to a person who had pleaded guilty a right of appeal against conviction would be to attribute foresight far beyond all reasonable bounds. It was not until 1925 that a general right of appeal was given to a person who had pleaded guilty, and that was a right of appeal against sentence only.

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[2] [1920] 1 K.B. 16; 35 T.L.R. 670.

[3] [1920] 1 K.B. 519; 36 T.L.R. 141.

[4] [1951] 1 K.B. 383; 66 T.L.R. 804; [1950] 2 All E.R. 1043.

[5] [1943] K.B. 508; 59 T.L.R. 259; [1943] 1 All E.R. 638.

[6] Criminal Justice Act, 1948, s. 36 (1): "A person convicted by a court "of summary jurisdiction shall have "a right of appeal (*a*) if he pleaded "guilty . . . against his sentence; "(*b*) in any other case, against the "conviction or sentence . . ."

[7] [1943] K.B. 604; [1943] 2 All E.R. 160.

[8] [1920] 1 K.B. 519.

H. S. Grannum in reply. It is not for this court to say whether or not the applicant is a person aggrieved: provided that she is acting bona fide she has a right of appeal under section 50 of the Act of 1839. The Act should not be interpreted in accordance with the supposed intention of the legislature, since the words of the statute are clear in themselves. On the authority of *Mittelmann* v. *Denman* [8] the applicant has the right of appeal which she seeks; she should not be deprived of that right except by the clear words of an Act of Parliament: *Mattison* v. *Johnson*.[9]

LORD GODDARD C.J. Mr. Grannum moves on behalf of Lillian Mary Borg for an order of mandamus directed to the deputy chairman of the County of London Quarter Sessions to hear and determine an appeal from a conviction at the Marlborough Street metropolitan magistrates' court.

The applicant, who was summoned for certain alleged offences in connexion with the keeping of a brothel, pleaded guilty at her trial. A representative of the Westminster City Council laid the facts of the case before the magistrate; and the representative said sufficient to indicate that he spoke of a brothel. The applicant did not dispute any fact which was stated in court to the magistrate. Having been convicted and sentenced to imprisonment, she was advised, apparently, to appeal not only against her sentence but also against her conviction.

A right of appeal in London was given against conviction by the Metropolitan Police Courts Act, 1839. The Summary Jurisdiction Act, 1879, which gave power to courts of summary jurisdiction to hear not only summary offences but also certain indictable offences, gave a right of appeal to quarter sessions against conviction; but the Act of 1879 gave no right of appeal if a person had pleaded guilty. By the Criminal Justice Act, 1925, an appeal was given, for the first time, to a person who had pleaded guilty; but the appeal was only against sentence.

Section 50 of the Metropolitan Police Courts Act, 1839, is in these terms: "In every case of summary order or conviction "before any of the said magistrates, in which the sum or penalty "adjudged to be paid shall be more than £3, or in which the "penalty adjudged shall be imprisonment for any time more than "one calendar month, any person who shall think himself

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[8] [1920] 1 K.B. 519.

[9] (1916) 85 L.J.K.B. 741; 25 Cox C.C. 373.

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"aggrieved by the order or conviction may appeal to the justices "of the peace at the next general or quarter sessions." In *Mittelmann* v. *Denman*[1] it was decided by this court that that section 50 of the Metropolitan Police Courts Act, 1839, was unaffected by the subsequent legislation in so far as that section gave a right of appeal to a defendant who had pleaded guilty. But when one reads *Mittelmann* v. *Denman*[1] carefully it is obvious that what the court was holding there was that that section gave the court power to consider the sentence—not the conviction—if the defendant had pleaded guilty. Mr. Purchase, who had great experience in these matters, put the matter quite clearly in his argument, in which he said[2]: "The section does "not limit the right of appeal to a defendant who has not pleaded "guilty. That section therefore, assuming that it has not been "repealed, gives the defendants the right of appeal which they "claim. That section, in so far as it gives a right of appeal to a "person who has pleaded guilty, has never been expressly or "impliedly repealed or superseded by any later Act. It has not "been impliedly repealed either by section 19 of the Summary "Jurisdiction Act, 1879, or by section 37 of the Criminal Justice "Administration Act, 1914, because the right of appeal which it "gives has been widened and extended by these Acts. Section 19 "of the Act of 1879 in giving a right of appeal which is limited "to persons 'not otherwise authorized to appeal' expressly "recognizes as still existing the right of appeal given by section "50 of the Act of 1839. At all events these later enactments "have not repealed section 50 of the Act of 1839 in so far as it "gives a right of appeal to a defendant who has pleaded guilty. "There are reasons why they should not have done so. These "later enactments do not themselves give to a defendant who "has pleaded guilty any right of appeal, and it frequently "happens, as in the present case, that the Act or statutory "order constituting the offence does not give him any right of "appeal, and, therefore, if these later enactments repealed "section 50 entirely, it would follow that in many cases a "defendant who had pleaded guilty and been sentenced with "undue severity or was otherwise aggrieved would have no right "of appeal at all." I think it is clear when one reads the judgment of the court in that case that the whole point was whether an appeal lay under section 50 so that a person who had been sentenced under section 50 after a plea of guilty could appeal against his sentence. That was all the court was considering there.

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[1] [1920] 1 K.B. 519; 36 T.L.R. 141.

[2] [1920] 1 K.B. 519, 521.

The point which has been raised in the present case did not arise in that case because here the sessions inquired whether this woman deliberately and intentionally pleaded guilty, and therefore understood what she was doing. This court has decided that it is open to a court of quarter sessions to consider whether or not a plea of guilty which has been entered ought to have been accepted as a plea of guilty, because it sometimes happens that a person pleads guilty when it is clear from the statements he makes that the plea ought to have been one of not guilty. In *Reg.* v. *Durham Quarter Sessions* [3] a man was charged with stealing a bicycle. He pleaded guilty, but made a statement to the bench which clearly showed that he was setting up a defence that he had reasonable grounds for believing that he had mistaken it for his own bicycle. He was sentenced and he went to quarter sessions. We held that quarter sessions had a right to inquire into the matter although he had pleaded guilty and to say the plea of guilty ought never to have been taken; and we sent the case back to the magistrates. The court treated the conviction as a nullity and sent the case back to the magistrates to be reheard. On the contrary, in *Rex* v. *West Kent Quarter Sessions Appeal Committee, Ex parte Files* [4] (which was considered in the *Durham* case [5]), quarter sessions decided that a man who had pleaded guilty to a charge of dangerous driving and had been warned that if he did plead guilty he would not be able to go to quarter sessions, but who had nevertheless insisted on pleading guilty, had pleaded guilty by mistake. We thought that he had pleaded guilty deliberately and that he could not be allowed to appeal.

In *Mittelmann's* case [6] the point which has been raised by Mr. Caulfield on behalf of the respondent was never considered. Section 50 of the Act of 1839 provides: " . . . any person who " shall think himself aggrieved by the order or conviction." How can a person who pleads guilty deliberately—and it has been found that the applicant intended to plead guilty deliberately —be aggrieved by a conviction? It is well known ever since the Court of Criminal Appeal has been in existence that the court will not entertain appeals against convictions by prisoners who have pleaded guilty unless there ought never to have been a plea of guilty, the plea having obviously been made under some mistake. It is idle to say that a person can put himself before the court as a person who should think himself aggrieved if he has no reasonable ground for thinking himself aggrieved. That was one of the points which the Court of King's Bench considered in *Rex* v. *Inhabitants of Bishop Wearmouth*,[7] where an appeal was given to persons who considered themselves aggrieved more in civil matters than criminal matters. Lord Denman C.J. said [8]: "That clause as it seems to me ought not to be construed "so as to let in anyone who, taking a capricious view of the "order, may think himself aggrieved by it, when it is clear "that he was not intended to be included in it, but must be "confined to those who may have reasonable grounds for thinking "themselves aggrieved."

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[3] [1952] 2 Q.B. 1; [1952] 1 T.L.R. 516; [1952] 1 All E.R. 466.

[4] [1951] 2 T.L.R. 470; [1951] W.N. 440; [1951] 2 All E.R. 728.

[5] [1952] 2 Q.B. 1.

[6] [1920] 1 K.B. 519.

There is certainly no reason for the applicant, who had been convicted of offences in connexion with the keeping of a brothel, to feel herself "aggrieved." In my opinion, it is impossible to say that a person who has pleaded guilty deliberately, as the court of quarter sessions found that this woman did, can be heard to say she is "a person aggrieved" by the conviction. That she has a right to appeal against sentence there is no doubt; and the court of quarter sessions has adjourned consideration of the appeal against sentence until we have dealt with the matter in this court. Since *Mittelmann* v. *Denman*,[9] and at any rate until the Criminal Justice Act, 1925, it was always considered that a person had a right to go to quarter sessions under section 50 of the Metropolitan Police Courts Act, 1839, to appeal against the sentence. In my opinion, section 50, properly construed, does not give a person who has pleaded guilty a right to appeal against the conviction. The section is wide enough to enable the person to appeal against sentence, and that this woman can do; but I do not think that it can be said that the fair meaning of the words of section 50 is that a person who has pleaded guilty can be heard to say she is aggrieved by her conviction.

For those reasons I think the motion fails and must be discharged.

Byrne J. Before 1925 a person who pleaded guilty to a summary offence in any court of summary jurisdiction other than a metropolitan magistrates' court had no right of appeal. Section

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[7] (1834) 5 B. & Ad. 942.
[8] Ibid. 949.
[9] [1920] 1 K.B. 519.

25 of the Criminal Justice Act, 1925, gave a right of appeal to a person who had pleaded guilty. That section was repealed by the Criminal Justice Act, 1948, which in turn was repealed by the Magistrates' Courts Act, 1952, section 83 of which provides a right of appeal in the case of a person who has pleaded guilty.

By section 50 of the Metropolitan Police Courts Act, 1839, a right of appeal was given to a person who thought himself aggrieved by an order or conviction in which the sum or penalty adjudged to be paid was more than £3 or the imprisonment was longer than one month. It was held in *Mittelmann* v. *Denman* [9] that that section had not been impliedly repealed by section 19 of the Summary Jurisdiction Act, 1879, or by section 37 of the Criminal Justice Administration Act, 1914, by both of which statutes a right of appeal was given only where there had not been a plea of guilty. The Metropolitan Police Courts Act, 1839, remains unrepealed, and it is now argued before this court that *Mittelmann* v. *Denman* [9] is authority for the proposition that a person who pleaded guilty to a summary offence before a metropolitan magistrate and was sentenced to longer than one month's imprisonment has a right of appeal against conviction. It is to be observed that in *Mittelmann* v. *Denman* [9] the defendants pleaded guilty; and the arguments and judgments were concerned and, as I read the case, only concerned, with the question of whether in those circumstances there was a right of appeal by virtue of section 50 of the Metropolitan Police Courts Act, 1839. It was held that there was a right of appeal. I can find nothing in that case to support the contention that it decided that there was a right of appeal against conviction after a plea of guilty. I fail to see how a person, to use the language of section 50, can "think himself aggrieved" by a conviction when in fact he unequivocally pleaded guilty. He can, of course, think himself aggrieved by the sentence of imprisonment, and if that sentence was longer than one month he has a right of appeal against sentence by virtue of section 50 of the Act of 1839; and, of course, he now also has a right of appeal against sentence by virtue of section 83 of the Magistrates' Courts Act, 1952.

For those reasons I agree with the observations my Lord has made, and I agree that this motion must fail.

DEVLIN J. I also agree.

Application dismissed.

Solicitors: *Norman Lipman & Co.; Allen & Son.*

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[9] [1920] 1 K.B. 519.

L. LONDIN UNIV

1957
Oct. 15, 16.

Lord Goddard C.J., Donovan and Havers JJ.

NOTTINGHAM No. 1 AREA HOSPITAL MANAGEMENT COMMITTEE *v.* OWEN.

Public Health—Nuisance—Smoke—Emission of smoke from hospital chimney—Hospital vested in Minister of Health and providing hospital and specialist services under Naional Health Service Act, 1946*—Complaint issued by local authority against hospital management committee—Whether hospital occupied "for public service of "the Crown"—Whether management committee amenable to jurisdiction of justices—National Health Service Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 81)*—Public Health Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *ss.* 103, 106.

Crown—Statute—Application to.

National Health Service—Hospital—Nuisance—Smoke—Jurisdiction of justices.

Meaning of "of."

By section 106 of the Public Health Act, 1936: "If it appears "to a local authority that a smoke nuisance . . . exists on any "premises occupied for the public service of the Crown, they shall "report the circumstances to the appropriate Government department, and, if the Minister responsible for that department is "satisfied . . . that such a nuisance exists, he shall cause such "steps to be taken as may be necessary to abate the nuisance . . ."

The chimney of a general hospital had for some years emitted black smoke so as to be a nuisance. The hospital had vested in the Minister of Health under the provisions of section 6 of the National Health Service Act, 1946. It provided hospital and specialist services under Part II of that Act and it was under the management and control of the hospital management committee on behalf of the regional hospital board set up under the Act. The local authority, having served an abatement notice, issued a complaint under section 103 of the Public Health Act, 1936, against the hospital management committee asking that they be summoned to show cause why an order should not be made requiring them to abate the nuisance. At the hearing of the complaint objection was made by the hospital management committee that the justices had no jurisdiction to hear the case on the grounds that the hospital was Crown property occupied for the public service of the Crown, that the Public Health Act, 1936, did not bind the Crown, and that the procedure which should have been followed was that set forth in section 106 of the Act. The justices considered that they had jurisdiction and they made an order requiring the committee to abate the nuisance:—

Held, that the Minister held the hospital in trust for the Crown and the hospital management committee who managed and controlled the hospital were carrying out on his behalf the duties of providing a hospital service and carrying on the hospital, imposed on the Minister by an Act of Parliament and, therefore, the hospital premises were premises "occupied for the public service

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"of the Crown"; and that, accordingly, the justices had had no jurisdiction to hear the complaint.

Dictum of Lord Westbury L.C. in *Mersey Docks and Harbour Board Trustees* v. *Cameron* (1864) 11 H.L.C. 443, 504, 505 applied.

CASE STATED by Nottingham justices.

On March 1, 1957, a complaint under section 103 of the Public Health Act, 1936,[1] was preferred by the town clerk of the City of Nottingham, acting for and on behalf of the local authority, Nottingham Corporation, against the Nottingham Area No. 1 Hospital Management Committee alleging that on July 12, 1955, a notice under the provisions of the Public Health Act, 1936, to abate a nuisance arising at the General Hospital, Nottingham, from a chimney emitting black smoke in such quantity as to be a nuisance was duly served on the hospital management committee, and that the committee had made default in complying with the requirements of the notice, and applying that they should be summoned to answer the complaint and to show cause why an order should not be made requiring them to comply with the requirements of the notice or otherwise to abate the nuisance and to execute any works necessary for the purpose and prohibiting a recurrence of it.

At the hearing before the justices a preliminary submission was made on behalf of the hospital management committee that the justices had no jurisdiction to hear the case. It was contended that the General Hospital, Nottingham, was Crown property and occupied for the public service of the Crown, having vested in the Minister of Health on July 5, 1948, under the provisions of section 6 of the National Health Service Act, 1946, and being a hospital providing hospital and specialist services under Part II of that Act in the area of the Sheffield Regional Hospital Board and under the management and control, on behalf of that board, of the hospital management committee; that section 1 of the National Health Service Act, 1946, made the Minister of Health responsible for a comprehensive health service in England and

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[1] Public Health Act, 1936, s. 103 (1): ". . . where a smoke nuisance "exists on any premises, an abate- "ment notice may be served and a "complaint with respect to the nuis- "ance may be made in like manner, "and thereupon the like proceedings "shall be had . . . as in the case of "any other statutory nuisance."

S. 106: "If it appears to a local "authority that a smoke nuisance . . . "exists on any premises occupied for "the public service of the Crown, "they shall report the circumstances "to the appropriate Government "department, and, if the Minister "responsible for that department is "satisfied after due inquiry that such "a nuisance exists, he shall cause "such steps to be taken as may be "necessary to abate the nuisance and "to prevent a recurrence thereof."

Wales and section 3 required him to provide hospital and specialist services as therein provided; that by force of section 12 of that Act the hospital management committee were agents of the Regional Hospital Board and the board were agents of the Minister in controlling and managing the hospital, and the committee was financed by money provided by Parliament in accordance with section 54; that the complaint was issued under the provisions of section 103 of the Public Health Act, 1936, which Act did not apply to the Crown or to premises occupied by or on behalf of the Crown except in so far as sections 106 and 341 might in any particular case be applicable; that the Crown was exempt from legislative control unless any relevant statute was expressly made to bind the Crown, and the Public Health Act, 1936, did not bind the Crown except as mentioned above; and that section 106 of the Public Health Act, 1936, dealt specifically with smoke nuisances on Crown property or premises occupied for the public service of the Crown and set forth the procedure which must be followed with regard thereto by the local authority.

On behalf of the local authority it was contended that the complaint was issued not against the Crown but against the hospital management committee, a body corporate, which by virtue of section 13 of the National Health Service Act, 1946, notwithstanding that it might be exercising functions on behalf of the regional hospital board was liable in respect of any liabilities (including tortious liabilities) incurred in the exercise of those functions in all respects as if it were acting as a principal, and all proceedings for the enforcement of such liabilities should be brought against the committee in their own name; that the hospital management committee were the occupiers of the hospital and the hospital was occupied for the purposes of the committee; and that section 93 of the Public Health Act, 1936, imposed the primary obligation to abate a nuisance on the person by whose default or sufferance it arose and not upon the owner or occupier, and the present proceedings were brought against the hospital management committee by whose default the nuisance arose and on whom by section 12 (2) of the National Health Service Act, 1946, was placed the duty of control and management of the hospital.

The justices were of the opinion that they had jurisdiction to hear the case. They proceeded to do so and found the following facts. A serious nuisance existed owing to the chimney of the General Hospital emitting black smoke, which nuisance had existed and had been known by the hospital management committee to exist for upwards of seven years. The causes of the nuisance were failure to instal suitable and sufficient boilers and grit arresting plant and failure to keep the steam load within the rated capacity of the boilers. Notice to abate the smoke nuisance had been duly served on the hospital management committee on July 12, 1955.

The justices were of the opinion that the complaint was true and accordingly ordered that the hospital management committee should within four calendar months of the service upon them of the order execute all works necessary to abate the nuisance.

The hospital management committee appealed.

Rodger Winn for the hospital management committee. The Public Health Act, 1936, does not bind the Crown. A statute does not bind the Crown unless it does so expressly or by necessary implication. The implication in the Public Health Act, 1936, is of the contrary nature: see, e.g., section 341. The Act is a consolidating Act, and section 106 is a re-enactment, with insignificant changes, of the provisions in section 11 of the Public Health (Smoke Abatement) Act, 1926. As to the position under the Public Health Act, 1875, see *Hornsey Urban District Council* v. *Hennell*,[2] *Cooper* v. *Hawkins*[3] and *Gorton Local Board* v. *Prison Commissioners*.[4] Under section 106 of the Act of 1936 smoke nuisances are not to be made the subject of summary proceedings taken under the Act against the Crown; the section provides that the abatement of smoke nuisances emanating from premises occupied for the public service of the Crown is a ministerial responsibility; it is mandatory on the Minister to take action and is also mandatory on the local authority to report the nuisance to the Minister. The local authority are not given the alternative of adopting the summary procedure under the Act.

[LORD GODDARD C.J. Might not an injunction be obtained against the hospital management committee?]

In view of section 13 (1) of the National Health Service Act, 1946, it is not contended that the hospital management committee might not be liable in tort, but the fact that they may be liable in tort under that Act does not mean that criminal liability under another Act is to be imposed on them. Under section 6 of the National Health Service Act, 1946, the whole of the hospital

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[2] [1902] 2 K.B. 73; 18 T.L.R. 512.

[3] [1904] 2 K.B. 164; 19 T.L.R. 620.

[4] [1904] 2 K.B. 165, n.

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premises vested in the Minister, who holds them in trust for the Crown (see section 7 (3) of the Ministry of Health Act, 1919), and must use them for the purpose of carrying out the duty to provide hospital accommodation and specialist services imposed on him by section 3 of the Act of 1946. The hospital management committee manage and control the hospital on behalf of the regional hospital board, who act on behalf of the Minister (see sections 11 and 12), but the Minister occupies the hospital through the committee in the same way as he might do through a caretaker. The provision of hospital accommodation and specialist services in pursuance of the duties imposed on the Minister by Act of Parliament is the provision of a public service of the Crown; under the Act the Minister had the duty and the power to ensure that the hospital premises vested in him are used for such purposes, and therefore the hospital premises, albeit occupied by the hospital management committee on behalf of the regional hospital board, are de facto occupied by the committee for the public service of the Crown, and may only be used for that service. [Reference was made to *Hills (Patents) Ltd.* v. *University College Hospital Board of Governors.*[5]] The provisions of section 106 are therefore applicable and the justices had no jurisdiction to make the order.

J. Elson Rees for the local authority. In 1936, when the Public Health Act, 1936, was passed, the public service of the Crown meant either the civil service or the three armed services. It is submitted that "public service of the Crown" in section 106 refers to the Crown in its executive and ruling capacities and that the section was intended to apply to premises occupied for the assistance and use of the Crown in those capacities, for example, buildings requisitioned for the occupation of troops, a Royal Air Force aerodrome or a building housing a Government department. In *Hornsey Urban District Council* v. *Hennell*[6] and *Gorton Local Board* v. *Prison Commissioners*[7] the premises were occupied for the assistance and use of the Crown. The provision of a hospital service and accommodation is for the assistance and benefit of the public. The mere fact that a statute directs a Minister to do something does not mean that that something is a public service of the Crown, otherwise public service of the Crown would include everything that a Minister is required by Parliament to do by delegation. Under the National Health Service Act, 1946, the

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[5] [1956] 1 Q.B. 90; [1955] 3 All E.R. 365.

[6] [1902] 2 K.B. 73.

[7] [1904] 2 K.B. 165, n.

Crown does not supply hospital accommodation and specialist services, but sets up regional boards to do so, and the hospital is occupied by the hospital management committee, not for the public service of the Crown but for the purposes of the regional board which, under section 12, have to administer the hospital and specialist services in their area. There is a distinction between having a duty to provide something and the occupation of premises for the purpose of carrying out that duty. The words of section 106 are not wide enough to include buildings occupied under the provisions of the Act of 1946 merely because the Minister is directed by that Act to provide a service for the public. Nor is the fact that money is provided by Parliament sufficient to constitute a public service of the Crown. The hospital management committee are not in any way servants of the Crown.

Section 13 of the National Health Service Act, 1946, shows a clear intention that hospital management committees and regional boards are to bear the burden of and take the blame for anything which happens on premises occupied by them. Under section 92 (1) of the Public Health Act, 1936, a local authority may take summary proceedings in respect of "statutory "nuisances," and section 106 affords no protection to the hospital management committee: compare section 99. Section 106 only provides what a local authority must do; it imposes on them the duty to report to the Minister and then it is for the Minister to abate the nuisance, when no proceedings need be taken; it requires the local authority to act as a watchdog, but it is disputed that it deprives them of their other rights.

Rodger Winn, in reply, referred to the observations of Lord Westbury L.C. in *Mersey Docks and Harbour Board Trustees* v. *Cameron.*[8] "Of" in "public service of the Crown" in section 106 is not a loose possessive genitive but a genitive of origin.

LORD GODDARD C.J. stated the facts as set out above and continued: The question raised by the case is whether, in view of the provisions of section 106 of the Public Health Act, 1936, the justices had jurisdiction to hear the complaint. I am bound to say that it is with some regret that I have come to the conclusion that the justices did not have jurisdiction and that this appeal will have to be allowed. I say that because it is quite clear that had this hospital not vested in the Minister of Health under the National Health Service Act, 1946, but remained a voluntary or municipal hospital, as the case may be, the procedure provided by section 103 of the Public Health Act, 1936, for the abatement of a smoke nuisance would have been appropriate. That is a cheap, quick and simple method of providing for the abatement of nuisance, which does away with the necessity of having to bring long and expensive actions, but the Minister of Health has chosen to take this point, and therefore we have to decide it.

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[8] (1864) 11 H.L.C. 443, 504, 505.

It is submitted that the hospital, being a hospital which is vested in the Minister, constitutes premises occupied for the public service of the Crown, and we have to see whether that is a well-founded submission. Before considering the provisions of the National Health Service Act, 1946, it is necessary to glance at the provisions of the Public Health Act, 1936. Under certain sections in that Act there are set out matters which are known as statutory nuisances. A bench of justices sitting as a court of summary jurisdiction do not have authority to make abatement orders in respect of every nuisance, but there are certain nuisances which are prescribed by statute as being fit matters for this summary jurisdiction. Among them is smoke nuisance; that is to say, the emission of large quantities of black smoke so as to be a nuisance and deleterious to the health of the neighbourhood. Sections 101 to 106 of the Public Health Act, 1936, contain provisions with regard to smoke nuisances, and by section 103 if, in the opinion of the proper authority, a smoke nuisance exists by the emission of black smoke from chimneys which are not chimneys of private houses, proceedings can be taken before the justices and an application made for an order compelling the owner of the chimney to abate the nuisance. But, for some reason upon which we need not speculate, section 106 of the Act contains a provision—which does not appear in the statute book for the first time but was in the previous Public Health Acts, in substantially though not in quite the same terms—that: "If it appears to a local authority that a "smoke nuisance within, or affecting any part of, their district "exists on any premises occupied for the public service of the "Crown, they shall report the circumstances to the appropriate "Government department, and, if the Minister responsible for "that department is satisfied after due inquiry that such a "nuisance exists, he shall cause such steps to be taken as may "be necessary to abate the nuisance and to prevent a recurrence "thereof." Therefore, it seems clear under that section that the simple and speedy procedure which may be taken against private persons in respect of a smoke nuisance cannot be taken in respect of the emission of smoke from premises which are occupied for the public service of the Crown, but that in such a case the duty is on the local authority to report the matter to the Minister, who may, if he is satisfied that a nuisance exists, take such steps as may be necessary to abate the nuisance. It does seem, although it is not necessary to decide the point, that this provision only applies to summary proceedings taken under the Act and does not prevent the local authority from bringing an action for an injunction or the abatement of a nuisance as the case may be, but the question which we have to decide is whether this hospital comes within the expression " premises occupied for " the public service of the Crown."

Section 1 of the National Health Service Act, 1946, provides that: " It shall be the duty of the Minister of Health (hereafter " in this Act referred to as 'the Minister') to promote the " establishment in England and Wales of a comprehensive health " service designed to secure improvement in the physical and " mental health of the people of England and Wales and the pre- " vention, diagnosis and treatment of illness, and for that purpose " to provide or secure the effective provision of services in accord- " ance with the following provisions of this Act," and one of the services that has to be provided is hospital accommodation and hospital treatment.

Section 3 (1) provides: " As from the appointed day, it shall " be the duty of the Minister to provide throughout England and " Wales, to such extent as he considers necessary to meet all " reasonable requirements, accommodation and services of the " following descriptions, that is to say: (*a*) hospital accommoda- " tion." Then section 6 makes provision for the transfer of hospitals to the Minister. The hospitals are transferred to the Minister, who becomes the owner of them, and by section 7 (3) of the Ministry of Health Act, 1919: " For the purpose of " acquiring and holding land, the Minister for the time being " shall be a corporation sole by the name of the Minister of " Health, and all land vested in the Minister shall be held in " trust for His Majesty for the purposes of the Ministry of " Health." So that once this hospital is transferred to the Minister under the National Health Service Act, 1946, it seems to be clear that he holds it in trust for the Crown.

The Act of 1946 then goes on to provide how the Minister is to carry out his duties. Different provisions apply to teaching hospitals from those applying to general hospitals but, generally speaking, without going into it in too great detail, by section 11 (1) "The Minister shall by order constitute, in accord-"ance with Part I of the Third Schedule to this Act, boards, "to be called regional hospital boards," and they have functions with respect to hospitals and specialist services. Then by subsection (3): "Every regional hospital board shall, within such "period as the Minister may by direction specify, submit to the "Minister a scheme for the appointment by them of committees, "to be called hospital management committees, for the purpose "of exercising functions with respect to the management and "control of individual hospitals or groups of hospitals, other than "teaching hospitals, providing hospital and specialist services in "the area of the board."

It is not disputed that the Nottingham Area No. 1 Hospital Management Committee administers this hospital. By the Third Schedule, Part 4, both the regional board and the hospital management committee are made corporations, so they are corporate bodies and, as such corporate bodies, carry out the administration of this hospital, subject, of course, to the control of the Minister, and they are to carry it out on behalf of the Minister, whose duty it is to provide hospital accommodation.

The first thing to be noted in section 106 of the Public Health Act, 1936, is that the section applies to premises "occupied for "the public service of the Crown" and not to the occupiers: that is to say, it does not matter who occupies the premises; if they are occupied for the public service of the Crown the section applies, and there is no doubt that the occupiers of these premises are the hospital management committee. As the hospital management committee they are carrying on the duties which are imposed on the Minister, and I should find it very difficult to say that considering that this service, the hospital service, is a service which is provided by the Minister in pursuance of his duty to carry out the provisions of the Act of Parliament, that this is not a public service of the Crown.

At a late stage in this case Mr. Rodger Winn called our attention to an authority which seems to be of assistance. It is a quotation from the speech of Lord Westbury L.C. in *Mersey Docks and Harbour Board Trustees* v. *Cameron*,[1] where he said: "At last, in the case of the *Tyne Improvement Commissioners* "v. *Chirton*[2] the Court of Queen's Bench recurred to that,

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[1] (1864) 11 H.L.C. 443, 504, 505.

[2] (1859) 1 El. & El. 516.

"which is in my opinion the true principle, namely, that the only "ground of exemption from the statute of Elizabeth is that "which is furnished by the rule, that the Sovereign is not bound "by that statute, and that consequently when valuable property "(that is, property capable of yielding a net rent above what is "required for its maintenance), is sought to be exempted on the "ground that it is occupied by bare trustees for public purposes, "the public purposes must be such as are required and created "by the government of the country, and are therefore to be "deemed part of the use and service of the Crown." These purposes are such as are required and created by the statute for the Government of the country, and are deemed to be part of the use and service of the Crown. In my opinion, it would be impossible to say that the provision of hospitals for the purposes of the National Health Service Act, 1946, and the carrying on of a hospital is not for the public service of the Crown, and therefore I think that these premises are occupied for the public service of the Crown. As I say, I have some regret in this matter. This nuisance has been going on for a very long time. If the hospital had remained as it was before the Act, the justices would unquestionably have had jurisdiction to act in the way they did, and I can well understand their believing that the hospital management committee were amenable to their jurisdiction. However, for the reasons which I have endeavoured to state briefly I am of opinion that they were not, and that, therefore, this appeal must be allowed.

DONOVAN J. I agree. I think that the provisions of section 106 of the Public Health Act, 1936, apply, and that they are too strong in their terms for the respondent local authority.

HAVERS J. I agree.

Appeal allowed.

Solicitors: *Solicitor, Ministry of Health; Sharpe, Pritchard & Co. for Town Clerk, Nottingham.*

J. F. L.

C. A.

1957
Mar. 25, 26,
27, 28, 29;
Apr. 16.

Lord Goddard
C.J.,
Jenkins and
Morris L.JJ.

DAVEY *v.* HARROW CORPORATION.

[1951 D. 1919.]

Nuisance—Things naturally on land—Trees—Liability—Damage by roots encroaching from adjoining land—Whether adjoining landowner liable for damage.

Vendor and Purchaser—Conveyance—Parcels—Boundary—Ordnance survey—Boundary hedge—Line denotes centre of hedge.

The plaintiff's house was damaged by the penetration of roots which came from trees on the adjoining land, the property of the defendants. In an action for damages for nuisance:—

Held, that if trees encroached onto adjoining land, whether by branches or roots, and caused damage, an action for nuisance would lie against the owner of the land on whose property the trees stood. No distinction was to be drawn between trees that were planted and those that were self-sown, and it was no defence to say that damage was caused by natural growth.

Lemmon v. *Webb* [1894] 3 Ch. 1; 10 T.L.R. 467 applied.

Crowhurst v. *Amersham Burial Board* (1878) 4 Ex.D. 5 explained.

Giles v. *Walker* (1890) 24 Q.B.D. 656; 62 L.T. 933 questioned.

Per curiam. Where a boundary hedge is delineated on an Ordnance Survey map by a line, that line indicates the centre of the existing hedge. That is in accordance with the practice of the Ordnance Survey and courts can take notice of that practice as at least prima facie evidence of what a line on the map indicates.

Fisher v. *Winch* [1939] 1 K.B. 666; 55 T.L.R. 553; [1939] 2 All E.R. 144 applied.

Decision of Sellers J. reversed.

APPEAL from Sellers J.

The plaintiff, Arthur Henry Davey, was the owner and occupier of a house at 41, George V Avenue, Pinner, Middlesex. Encroaching roots from trees on adjoining land, the property of the Harrow Corporation, had caused damage by subsidence to his house. The plaintiff claimed damages for nuisance and for an injunction. Originally the defendants admitted that the trees were on their property, but subsequently they amended their defence, alleging that the trees were on land belonging to the plaintiff or his predecessors in title. The plaintiff's house was built in 1938 on a plot of land at the south corner of a field numbered 1097 on the ordnance survey. The land to the south of this field was owned at that time by the district council, and the defendants were their successors. The field had been bought in 1937 for development as a building estate by the vendors to the plaintiff, who built his house. The boundary to the plaintiff's plot was in part a concrete post and wire fence and in part his garage, which stood on that side of his plot. This fence had been put up by the builders as close in as possible to the north side of a hedge which bounded the field on its south side, and which stood on a low bank, to the south of which there was a ditch. There were a number of elm trees, upwards of 80 years old, growing on the bank, some of them within a few feet of the plaintiff's fence and garage. About 1949 cracks appeared in the walls of the plaintiff's house and garage. The plaintiff complained to the defendants, who first lopped the trees, and later cut them down, but denied liability to the plaintiff.

Sellers J. found that the damage (which he assessed at £1,000) was due to the abstraction of water by the roots of the trees from under the foundations of the plaintiff's house and garage, which had themselves deprived the soil of its natural moisture. He gave judgment for the defendants upon the ground that the presumption of hedge and ditch going together applied to the case, and that the plaintiff had not, therefore, proved that the trees belonged to the defendants.

The plaintiff appealed, and having been informed by the builders that they had in 1937 agreed with the defendants that the concrete post and wire fence should be treated as the boundary between their lands, and had been in correspondence with the defendants, obtained disclosure of such correspondence from the defendants and leave to call further evidence in the Court of Appeal.

J. G. Strangman Q.C. and *G. C. Heseltine* for the plaintiff. Sellers J. held that the presumption of hedge and ditch going together applied to the land in question and that that land belonged to the plaintiff's predecessors in title, the builders, in spite of the fact that the conveyance to the builders was by reference to the ordnance survey and that from 1938 to 1950 the defendants treated the trees as their own and removed them in 1950.

As both the conveyance to the builders and the conveyance to the predecessors in title of the defendants were by reference to the ordnance survey, there was no room for any presumption as to the ownership of the bank on which the hedge stood and of the ditch on the south side of that bank.

The universal practice of the ordnance survey office to take the central line of the hedge in delimiting the parcels shown on their maps was proved and accepted by the court in *Fisher* v. *Winch.*[1] There is only one ordnance survey and it was not, therefore, necessary to call evidence on this practice before Sellers J. [Reference was made to Key & Elphinstone's Precedents in Conveyancing, 15th ed., vol. 1, p. 347, and to *Rouse* v. *Gravelworks Ltd.*[2]]

[After discussion, the court gave leave to counsel for the plaintiff to call an official from the ordnance survey office, who spoke to the practice above mentioned.]

As the evidence now stands, the trees might (although this is not clear on the evidence adduced in the court below) have been owned by the builders and the defendants in common, but if, as the plaintiff now seeks to prove, they agreed in 1937 that the boundary between their lands was to be the concrete post and wire fence, it will follow that, at least from that time onwards, the trees belonged wholly to the defendants.

[A member of the firm of builders was then called, and said that in 1937 there had been a meeting on the site between the builders' foreman and a representative from the defendants' parks department, when the latter stated that the defendants claimed the hedge as theirs, to which the builders' foreman said that he had no objection, but would like to put their concrete post and wire fence as close as possible to the hedge (on its north side) without destroying it, and that it was agreed that this should be done.]

Upon the footing that the trees were at all material times the property of the defendants, there are eight propositions advanced on behalf of the plaintiff. (1) There is no material difference between the position as regards overhanging branches and encroaching roots of a tree over and onto the land of an adjoining owner. In either case it is a nuisance. (2) The nuisance can be abated at any time by the adjoining owner, by his cutting the overhanging branches or the encroaching roots, without notice to the owners of the trees. (3) So long as neither the branches nor the roots occasion damage to the adjoining owner, his only right is his right to cut. (4) If, and as soon as, damage is caused to him, an action on the case for damages will lie at his suit. (5) It is no answer to such a claim on the case that the adjoining owner could himself abate the nuisance. The owner of the trees has no right to put an adjoining owner to the expense of abating the nuisance. (6) The age of the tree and time it has been encroaching or overhanging are alike irrelevant, because there can never be acquired by prescription the right to overhang or encroach. The reason for that is because the extent of the encroachment varies from day to day and year to year with the natural growth of the trees. (7) It is no defence that the adjoining owner damnified by the encroachment has come to the nuisance by building his house near to the boundary where the roots encroached. A man is entitled to the full use and enjoyment of his land free from nuisance emanating from his neighbour. (8) On the same broad principle it can be no defence that the house itself deprived the ground of water and so encouraged the roots to extend still further in their search for moisture. Authority for those propositions is to be found in *Lemmon* v. *Webb* [3]; *Smith* v. *Giddy* [4]; *Middleton* v. *Humphries* [5]; *Butler* v. *Standard Telephones and Cables Ltd.*[6]; *Davis* v. *Artizans Estates Ltd.*[7]; *McCombe* v. *Read* [8]; *Noble* v. *Harrison* [9]; *Sturges* v. *Bridgman* [10]; *Job Edwards Ltd.* v. *Birmingham Navigations*,[11] and *Sedleigh-Denfield* v. *O'Callaghan.*[12]

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[1] [1939] 1 K.B. 666; 55 T.L.R. 553; [1939] 2 All E.R. 144.

[2] [1940] 1 K.B. 489; 56 T.L.R. 225; [1940] 1 All E.R. 26.

[JENKINS L.J. Is there any duty to mitigate? Can a person who sees encroaching roots on his land build a house and wait for it to fall down?]

It is not necessary for the plaintiff to go that far, but if it were, the answer would be, Yes. *Smith* v. *Giddy*,[13] which has never been doubted, is authority for that proposition. The plaintiff and the builders had an absolute right to their property and were not bound to take special precautions when building the house near the boundary line and the trees. The roots must then have been cut by the builders to an extent sufficient to enable them to lay the foundations and drains. They were not bound to cut the roots all round the boundary. Even if the roots had been so cut, they would have grown again. From the moment the house was built the defendants left the trees there at their own risk. If the plaintiff is right in law, the fact that hardship might be caused to the defendants is irrelevant; in any event they knew about the building from the beginning and passed the erection plans, building certificate and habitation certificate.

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[3] [1894] 3 Ch. 1; 10 T.L.R. 467.

[4] [1904] 2 K.B. 448; 20 T.L.R. 596.

[5] (1913) 47 Ir.L.T. 160.

[6] [1940] 1 K.B. 399; 56 T.L.R. 273; [1940] 1 All E.R. 121.

[7] [1953] C.P.L. 356.

[8] [1955] 2 Q.B. 429; [1955] 2 All E.R. 458.

[9] [1926] 2 K.B. 332; 42 T.L.R. 518.

[10] (1879) 11 Ch.D. 852.

[11] [1924] 1 K.B. 341; 40 T.L.R. 88.

[12] [1940] A.C. 880; 56 T.L.R. 887; [1940] 3 All E.R. 349.

[13] [1904] 2 K.B. 448.

Charles Russell Q.C. and *M. D. Van Oss* for the defendant corporation. The reason why one can lop branches and cut roots is not because they constitute a nuisance but because they are on one's own property: *Giles* v. *Walker*[14]; if one substitutes trees for thistles in that case, there is no duty to cut them down if they are a natural growth. In all the cases relating to trees, the trees had been planted, as opposed to being self-planted. There is evidence in the present case that the trees were not planted. A sharp distinction is to be drawn between a nuisance which has been planted by man and one which has grown naturally. Thistles can be compared with trees; in one case the seeds move through the air, and in the other the roots move through the ground. In one way a man whose neighbour has thistles on his land is in a more difficult position, because he cannot stop the seed settling on his land. If there is no duty, there can be no nuisance. There must be a legal duty before there can be a legal wrong. [Reference was made to *Neath Rural District Council* v. *Williams*.[15]] *Lemmon* v. *Webb*[16] must be carefully regarded because the only matters in it which have any bearing on the present case are the obiter dicta. If a tree encroaches on a person's land he may cut it down because it is on his property, but nobody is liable to his neighbour for something that happens naturally on his land. Absolute liability for things naturally put on land is unheard of. If thistles or trees grow naturally on the land, there is no obligation to one's neighbours. If no man's hand is to be found in the planting of the trees, there is no liability. [Reference was made to *Job Edwards Ltd.* v. *Birmingham Navigations*[17]; *McCombe* v. *Read*[18]; *Butler* v. *Standard Telephones and Cables Ltd.*[19]; *Middleton* v. *Humphries*[20]; *Smith* v. *Giddy*[21]; *Crowhurst* v. *Amersham Burial Board*[22]; *Pontardawe Rural District Council* v. *Moore-Gwyn*,[23] and *Sparke* v. *Osborne*.[24]] *Lemmon* v. *Webb*[25] was nothing more than a decision that a contention by the landowner that he had to have notice before a neighbour lopped overhanging branches was wrong. The rest of the judgments were obiter.

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[14] (1890) 24 Q.B.D. 656; 62 L.T. 933.

[15] [1951] 1 K.B. 115; 66 T.L.R. (Pt. 2) 539; [1950] 2 All E.R. 625.

[16] [1894] 3 Ch. 1.

[17] [1924] 1 K.B. 341.

[18] [1955] 2 Q.B. 429.

[19] [1940] 1 K.B. 399.

[20] 47 Ir.L.T. 160.

[21] [1904] 2 K.B. 448.

[22] (1878) 4 Ex.D. 5.

[23] [1929] 1 Ch. 656; 45 T.L.R. 276.

[24] (1908) 7 C.L.R. 51.

[25] [1894] 3 Ch. 1.

It would have been quite irrelevant in *Lemmon* v. *Webb* [25] to distinguish between artificially and naturally planted trees.

[LORD GODDARD C.J. Why is there never any reference in the authorities to this distinction?]

In all the reported cases the trees appear to have been planted. Further, the authorities point out that there is a distinction in these cases between trespass and nuisance.

[LORD GODDARD C.J. *Sparke* v. *Osborne* [26] suggests that there is no distinction between naturally and artificially planted trees.]

In all other respects *Sparke* v. *Osborne*,[26] in which *Giles* v. *Walker* [27] is cited and followed, is in the defendants' favour. If seedlings sprout naturally no one is responsible for damage caused by them. If the plaintiff is right, then one is liable for whatever nature does: one becomes the insurer for one's neighbour. There is no decision that purely naturally sown trees create any such liability. The defendants have not actively preserved the trees. In *Sedleigh-Denfield* v. *O'Callaghan* [28] there was an active continuance of the nuisance. One does not continue a nuisance by just admiring it.

A second point arises. The effect of the 1937 boundary agreement and adjustment was that the builders, the plaintiff's predecessors in title, transferred the tree-bearing soil to the defendants for the purpose of allowing the defendants to maintain a screen for their cemetery. If that is so, the plaintiff cannot now bring an action for damages when his predecessors in title authorized it. The defendants need go no further than to say that the plaintiff cannot sue for damages unless he asked the defendants to remove the trees. In the present case most of the damage was done before any such request was made.

[Counsel for the plaintiff objected that this point was not raised on the pleadings.]

On the facts revealed, the plaintiff has no cause of action in nuisance for the damage done to his property before he asked the defendants to cut the trees down. Derogation from grant is mentioned as an illustration of the point. The defendants are entitled to put to the court the legal result arising from the facts now ascertained. It is the plaintiff's case that he has to prove that the trees are on the defendants' land. If by doing so he makes his position worse, the defendants are entitled to rely on it. [Reference was made to *Sansom* v. *Sansom*.[29]]

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[25] [1894] 3 Ch. 1.

[26] 7 C.L.R. 51.

[27] 24 Q.B.D. 656.

[28] [1940] A.C. 880.

If the defendants have failed to support the view of the trial judge in their favour—that the trees were not their property—they now wish to argue the other points.

[LORD GODDARD C.J. The court takes note of the plaintiff's objection but will hear the defendants' argument de bene esse. Had leave to amend been applied for, the court would not have granted it.]

The point which the defendants wish to raise is not that the position is the same as derogation from a grant, because in this case the plaintiff could have taken steps to cut the roots of the trees himself. The defendants submit that if one assents to a potential nuisance one cannot, until one has withdrawn the assent, say that one is a person being wronged. One can bind one's successors in title in an ordinary case of derogation from a grant, and it is submitted that the builders' assent was binding on the plaintiff.

A further and alternative aspect of the case is that the roots must have been fully established before the building of the plaintiff's house. The house prevented rain water getting to the land and was itself the prime reason for the dehydration of the land which caused the tree roots to push out further in search of water. Further, the plaintiff failed to minimize his damage by asking the defendants to cut down the trees. The suggestion that the defendants were well aware of the danger because they granted building and habitation certificates can be dismissed, since they only inspected the premises to ascertain whether certain byelaws had been complied with.

With regard to the plaintiff's contention that it is irrelevant that he moved to the nuisance, that would mean that a person could build a house at his boundary on top of roots from his neighbour's trees and then say that his neighbour must insure him against damage from those roots. Whether the trees are planted or self-sown, it is a normal, natural and reasonable user of land to plant trees as a fence, and the cases which say, if they do say, that to retain trees already planted is a nuisance, must be wrongly decided. That proposition may be open to qualification, and perhaps one may say that to plant a row of Lombardy poplars (as in *Butler's* case [30]) near houses may not be a normal and natural user, but where trees are normally and naturally on land, there can be no liability. That point is still open in this court; the dicta in *Lemmon* v. *Webb*[31] to the contrary are only obiter. The position is the same with regard both to branches and roots. The dicta of Kay L.J. in *Lemmon* v. *Webb*[32] do not assert that nuisance by roots continued by natural growth of trees is actionable; if those dicta do so assert, they are not correct in law; further, since they are only dicta they do not bind this court.

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[29] [1956] 1 W.L.R. 945; [1956] 3 All E.R. 446n.

[30] [1940] 1 K.B. 399.

Strangman Q.C. in reply. It is conceded that there is no evidence whether the trees were or were not planted by man.

[He was stopped on that point.]

The right to cut overhanging branches is a right to abate a nuisance. The property in the branches cut and in any fruit on those branches remains in the owner of the tree: *Mills* v. *Brooker*.[33]

As to the point that the effect of the 1937 agreement between the builders and the defendants for the adjustment of the boundary was to bar the plaintiff from complaining of damage caused before notice by him to the defendants, or a request by him that the defendants should cut down the trees: (1) this point is not open to the defendants on the pleadings; (2) it cannot be based on derogation from grant, because there was no grant; (3) if based on contract, it is bad for want of consideration; (4) if it is said to be an interest running with the land, it does not bind the plaintiff because it was not registered under the Land Registration Act.

A cause of action only arose in the present case when damage occurred. The damage only occurred after the house was built because of the continuing and changing nuisance of encroaching roots. One must look at the position at the time when the damage was done and inquire who at that time owned and was responsible for the trees whose roots were causing the damage. The defendants suggest that as the roots were on the land, the builders were foolish in building the house there, but when they did build they cut the roots in order to proceed with laying their foundations and therefore abated the nuisance. The right of abatement and the right to bring an action on the case are cumulative or alternative, but not mutually exclusive.

The defendants' final point—that it was the house itself which kept the moisture off the land and therefore caused the damage—is no answer in law. The position must be the same in every

[31] [1894] 3 Ch. 1.

[32] Ibid. 24.

[33] [1919] 1 K.B. 555; 35 T.L.R. 261.

case where a house is damaged by tree roots. The true question is not whether the land would have subsided if no house had been built on it, but whether the house would have subsided if the encroaching roots, which were a nuisance, had not been drawing off the moisture from under the house and injuring the foundations. [Reference was also made to *Holder* v. *Coates*,[34] *Cheater* v. *Cater*[35] and *Tipping* v. *St. Helen's Smelting Co.*[36]]

Cur. adv. vult.

April 16. LORD GODDARD C.J. The judgment I am about to read is the judgment of the court.

This appeal is from a judgment of Sellers J. dismissing an action brought by the plaintiff, the owner in fee of a house and premises, 41, George V Avenue, Pinner, claiming damages for nuisance and for an injunction on the ground that the roots of trees the property of the defendants, who are adjoining owners, have penetrated into his land and caused subsidence so that his house has been extensively damaged. The judge found that the plaintiff's house had been damaged by root penetration, but that the trees from which they came were not the property of the defendants, but of the plaintiff and that, accordingly, the questions of law which have been elaborately argued before this court did not arise, and he gave judgment for the defendants. The defendants, in the course of correspondence which had continued for a considerable time before action, had always contended that the trees in question were their property, and in the defence originally delivered they made this admission; but some two years later they obtained leave to amend and alleged that the trees were at all times material on the land belonging to the plaintiff and his predecessors in title. After judgment it was found that material letters and memoranda had not been disclosed by the defendants. Accordingly, application was made to the Court of Appeal, who directed further discovery and gave the plaintiff leave to call further evidence. Having seen these documents and heard the further evidence, this court has no doubt whatever that the trees were at the material time growing on the defendants' land. They have now been cut down by them. We shall, in the course of this judgment, deal more fully with this matter, but it is regrettable that the defendants attempted to resile from the attitude which for years they had taken up with respect to ownership, and we regret that they were given leave to amend after their admission had stood on the record for so long. It was this question of fact more than anything else which accounts for the length of time the case took in the court below and in this court, and led to the necessity of applying for leave to call further evidence. The costs of this litigation may well exceed the amount of the damages which the judge assessed at £1,000 if his finding should be reversed, and the only satisfaction that we can find in this matter is that as this court proposes to allow the appeal the defendants will have to pay them. Now that we have seen the additional documents to which we have referred, and heard the further evidence, the material facts can be succinctly stated.

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[34] (1827) Mood. & M. 112.

[35] [1918] 1 K.B. 247; 34 T.L.R. 123.

[36] (1865) L.R. 1 Ch. 66.

The land in question was formerly part of a farm. In the various conveyances which form the plaintiff's title, the parcels conveyed are always described by reference to the ordnance survey. The field with which this action is concerned is numbered on the latest survey 1097; it bore a different number in earlier maps, but this is immaterial. The boundary to the south is delineated on the map by a line, and the evidence of an official from the Ordnance Survey Office given before us, but not in the court below, was that the line indicated the centre of the existing hedge. This is in accordance with the invariable practice of the survey as was proved in *Fisher* v. *Winch*,[1] and in our opinion, after that case and this, courts in future can take notice of this practice of the Ordnance Survey as at least prima facie evidence of what a line on the map indicates. In the present case there is a ditch, or the remains of one, on the south side of the hedge, and the trees in question in this action were growing in the hedge. The hedge no doubt stood on a bank which we understand has almost disappeared. No doubt, therefore, the judge was justified, in the absence of the further evidence which was given before us, in applying the presumption that the bank and fence were the property of the landowner on whose side of the fence the ditch was not.

[His Lordship then referred to the further evidence as to the meeting in 1937 between the builders' foreman and a representative from the council's parks department, to agree where the boundary fence of the building estate should be placed. The council's representative said that the council claimed the hedge, to which the builders' foreman said that he had no objection but wanted his post and wire fence to be as near as possible to the hedge, and so it was agreed, and thereafter the council always treated the hedge as theirs. They cut and trimmed the grass and at some time lopped and topped the trees. His Lordship found that whatever the true position might have been before the meeting, thereafter the bank and fence with the trees on it were regarded as the property of the council, and that they had been in undisturbed possession of it ever since. His Lordship continued:] The evidence as to this meeting was not before the judge; had it been, we do not doubt he would have held, as we do, that it effectually displaced the presumption based on the position of the ditch. [His Lordship referred to the facts set out above and continued:] We have, therefore, to consider the points of law which it was unnecessary for the judge to decide, as he had held on the evidence before him that the trees were the property of the plaintiff and not of the defendants. The industry of counsel has led to the citation of a considerable number of cases, to some of which we must refer; but the principles which have to be applied seem to be now well established.

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[1] [1939] 1 K.B. 666; 55 T.L.R. 553; [1939] 2 All E.R. 144.

Mr. Russell, for the defendants, does not dispute that where a tree encroaches on a neighbour's land, whether by overhanging branches or by the penetration of roots, the adjoining owner can abate the nuisance by lopping the branches or grubbing up the roots. That the encroachment is not regarded as trespass, but as a nuisance, is well settled: *Pickering* v. *Rudd*,[2] *Lonsdale* v. *Nelson*[3] and *Lemmon* v. *Webb*.[4] In the latter case in the Court of Appeal all members of the court treat encroachment of roots or branches as being on the same footing. Kay L.J.,[5] who gave the longest and most elaborate judgment, said in terms that the encroachment of boughs and roots was a nuisance and for any damage occasioned an action on the case would lie. Mr. Russell submits that this part of the judgment, at least so much as says an action on the case would lie, is obiter, and invites us not to follow it. It is true that the actual point decided was that the adjoining owner could lop the branches which overhung his land without giving notice to the owner of the trees and that his right to do so was unaffected by the branches having overhung his land for more than 20 years. But this case went to the House of Lords,[6] and certainly nothing was said by way of disapproval of the judgment. The case has been cited again and again and has never been the subject of adverse comment. In our opinion, once it is established that encroachment by roots is a nuisance, it must follow that if damage is thereby caused, an action on the case will lie. To this, however, the defendants say first that no action will lie unless it is shown that the offending trees were planted and were not self-sown, and that no action can be maintained where the damage is caused by natural growth or natural causes.

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[2] (1815) 4 Camp. 219, 221.

[3] (1823) 2 B. & C. 302, 311.

[4] [1894] 3 Ch. 1; 10 T.L.R. 467.

[5] [1894] 3 Ch. 24.

[6] [1895] A.C. 1; 11 T.L.R. 81.

We cannot find that any distinction has ever been drawn between these two classes of trees, except possibly in *Crowhurst* v. *Amersham Burial Board*,[7] with which we will deal hereafter, nor do we see on what ground it could be. The nuisance consists in allowing the trees to encroach from the land of their owner into that of his neighbour. The owner must keep his trees in, just as he may not allow filth to escape from his premises onto that of his neighbour: *Humphries* v. *Cousins*,[8] though perhaps that case may be regarded as based on the doctrine of *Rylands* v. *Fletcher*.[9] But if an owner may abate the nuisance before it causes damage we can see no good ground on which it can be said that he is not entitled to bring an action if damage does result. Perhaps the objection that no action will lie in respect of damage caused by natural growth presents more difficulty. No distinction of this sort is to be found in *Lemmon* v. *Webb*[10] or any of the other cases dealing with trees, but reliance is placed on *Giles* v. *Walker*[11] and *Pontardawe Rural District Council* v. *Moore-Gwyn*.[12] The former case, which has not escaped criticism by text writers of great learning and eminence, and was cited, but with caution, by Scrutton L.J. in *Job Edwards Ltd.* v. *Birmingham Navigations*,[13] decided that no action lay where an owner had ploughed up forest land and in consequence a large growth of thistles sprang up and the thistledown was blown onto neighbouring land. The judgment of the Divisional Court is exceedingly short—Lord Coleridge C.J.[14] merely observing that he had never heard of such an action and that the alleged duty, namely, to cut the thistles, could not exist as the thistles were the natural growth of the soil. Lord Esher was the other member of the court and is reported as saying during the argument[15]: "This damage is not caused by any act of the defendant. Can

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[7] (1878) 4 Ex.D. 5.

[8] (1877) 2 C.P.D. 239.

[9] (1868) L.R. 3 H.L. 330.

[10] [1894] 3 Ch. 1.

[11] (1890) 24 Q.B.D. 656; 62 L.T. 933.

[12] [1929] 1 Ch. 656; 45 T.L.R. 276.

[13] [1924] 1 K.B. 341, 355; 40 T.L.R. 88.

[14] 24 Q.B.D. 656, 657.

[15] 62 L.T. 933, 934.

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"you show us any case which goes so far as to say that, if "something comes on a man's land for which he is no way "responsible, that he is bound to remove it, or else prevent its "causing injury to any of his neighbours?" Apparently counsel did not reply, but had he known of *Margate Pier and Harbour Proprietors* v. *Margate Town Council*,[16] it would have been a complete answer. In that case the harbour authority were held liable for a nuisance caused by the accumulation of seaweed washed up by the action of wind and tides into the harbour. Lush J.,[17] giving the judgment of the Divisional Court, almost as short as was that in *Giles* v. *Walker*,[18] said that he had no doubt whatever that it was the duty of the appellants to prevent the accumulation of seaweed so that it should not become a nuisance, whether produced by natural or artificial causes. Neither was this case cited in *Pontardawe*,[19] though it had been emphatically approved by A. L. Smith L.J. in the well-known case of *Attorney-General* v. *Tod Heatley*.[20] It may be that the court was disinclined to regard thistledown as sufficiently noxious to be dignified as a nuisance, and in 1890 agriculture was perhaps the least regarded of British industries. We think such an action today, especially if founded on nuisance and not on negligence, as was *Giles* v. *Walker*,[21] might well be decided differently. At any rate, this case did not deal with encroaching trees.

We must now say a word with regard to *Crowhurst* v. *Amersham Burial Board*,[22] as Mr. Russell relied on it in support of his contention that it was only if a tree was artificially brought to the land that there could be liability. The defendants in that case had planted a yew tree very close to the plaintiff's land and it grew through the railings separating the two properties. The plaintiff's horse ate some of the leaves, which are poisonous to animals, and for the death of the horse the plaintiff sued. Now, it is quite true that Kelly C.B.'s judgment was founded on *Rylands* v. *Fletcher*,[23] that a dangerous thing had been brought onto the land and allowed to escape. That, no doubt, was a simple ground for finding liability in that case. It was because the tree was poisonous that the damage was caused, and no damage would have resulted but for that fact, though the encroaching branches could have been cut back. On the other hand, in the equally well-known case of *Smith* v. *Giddy*,[24] the branches of a tree by overhanging the land of a neighbour spoilt his crop and it was held that the owner of the tree was liable, and though the court treated the case as analogous to *Crowhurst*,[25] we can find no indication in the judgment that there was any finding that the trees had been planted artificially or that it was on that ground that it was held that the defendant was liable. Kennedy J.[26] says that, whether *Rylands* v. *Fletcher*[27] applies or not, it was good law that a man has no right to maintain on his land, and instead of confining it allows it to thrust itself onto that of his neighbour, something which thereby does damage, and he further said that he did not see any reason why an action should not lie in that case or why the only right of the neighbour should be to go to the expense of lopping down the branches himself.

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[16] (1869) 20 L.T. 564.

[17] Ibid. 568.

[18] 24 Q.B.D. 656.

[19] [1929] 1 Ch. 656.

[20] [1897] 1 Ch. 560, 571; 13 T.L.R. 220.

[21] 24 Q.B.D. 656.

[22] 4 Ex.D. 5.

[23] L.R. 3 H.L. 330.

Finally, in *Noble* v. *Harrison*,[28] a Divisional Court consisting of Rowlatt and Wright JJ. distinctly held that there was no difference between trees planted or self-sown. In our opinion it must be taken to be established law that if trees encroach, whether by branches or roots, and cause damage, an action for nuisance will lie, and we would therefore allow the appeal and direct judgment to be entered for the plaintiff for £1,000, the damages assessed by the judge below.

It is only right that I should acknowledge the assistance that I have obtained in preparing this judgment from Dr. Goodhart's essay "Things naturally on the land" published in his Essays on Law and Jurisprudence.

Appeal allowed.
Leave to appeal to House of Lords refused.

Solicitors: *Howlett & Clarke; William Charles Crocker.*

C. J. E.

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[24] [1904] 2 K.B. 448; 20 T.L.R. 596; 73 L.J.K.B. 894.

[25] 4 Ex.D. 5.

[26] 20 T.L.R. 596; 73 L.J.K.B. 894, 896.

[27] L.R. 3 H.L. 330.

[28] [1926] 2 K.B. 332; 42 T.L.R. 518.

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11, 12, 26.

Pearson J.

GOULANDRIS BROTHERS LTD. *v.* B. GOLDMAN & SONS LTD.

Shipping—Bill of lading—Time bar—Hague Rules—General average contribution—Bill of lading incorporating York-Antwerp Rules, 1950, *and Hague Rules—General average expenditure incurred by ship—Expenditure incurred as result of shipowners' failure to use due diligence to make vessel seaworthy—No damage to goods—Claim by shipowners for general average contribution—"Rights"—"Remedies"—"Fault"—Equitable defence by cargo owners—Cross-claim by cargo owners for damages for breach of contract—Defence and cross-claim not barred by article III, rule* 6 *of Hague Rules—"Loss or damage"—York-Antwerp Rules,* 1950, *r. D—Carriage of Goods by Sea Act,* 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *Sch., art. III, r.* 6.

Shipping—General average.

Rule D of the York-Antwerp Rules, 1950, provides: "Rights to "contribution in general average shall not be affected, though the "event which gave rise to the sacrifice or expenditure may have "been due to the fault of one of the parties to the adventure; but "this shall not prejudice any remedies which may be open "against that party for such fault."

By article III, rule 6, of the Hague Rules: " . . . The carrier "and the ship shall be discharged from all liability in respect of "loss or damage unless suit is brought within one year after "delivery of the goods or the date when the goods should have been "delivered."

A bill of lading dated at Lagos, December 3, 1950, was issued by shipowners in respect of goods loaded on the s.s. *Granhill*, then at Lagos, for delivery at London. The bill of lading provided that general average compensation should be payable according to the York-Antwerp Rules, 1950, and was admittedly subject to the Hague Rules. Before calling at Lagos the vessel was at Sapele, where the engine-room staff negligently fed river water into the boilers, and on the voyage between Lagos and London, in the Bay of Biscay, trouble developed in the boilers and the vessel had to be towed to London, where the cargo was discharged in January, 1951. The goods were undamaged but expenditure of a general average nature was incurred by the ship. By reason of the river water in the boilers the ship was unseaworthy before and at the beginning of the voyage from Lagos, and the shipowners' failure to use due diligence to make her seaworthy was the cause of the general average expenditure being incurred. No suit was instituted by the cargo owners against the shipowners in respect of their breach of contract of carriage, and a general average adjustment having been prepared, the shipowners claimed that, notwithstanding that their failure to use due diligence to make the vessel seaworthy was the cause of the general average expenditure, they were, by virtue of rule D of the York-Antwerp Rules, 1950, and of the third paragraph of article III, rule 6, of the Hague Rules, entitled to recover contribution in general average from the cargo owners:—

Held, (1) that the objects of rule D of the York-Antwerp Rules were to keep all questions of alleged fault outside the average adjustment, and to preserve unimpaired the legal position at the stage of enforcement, so that the first part of the rule referred to rights to contribution in general average as they would be set out in the average adjustment, while the second part operated as a proviso under which those rights might be defeated or diminished. The shipowners, therefore, had a prima facie right to recover contribution from the cargo owners in general average subject to defeasance or diminution by the cargo owners' "remedies" for the "fault" of the shipowners.

(2) That in the absence of any definition in the York-Antwerp Rules of the words "fault" and "remedies" resort must be had to English law and that, in view of the manifest intention of rule D,

(*a*) the word "remedies" was wide enough to cover defences as well as cross-claims, and preserved for the cargo owners (i) the equitable defence that a person should not recover from any other person in respect of the consequences of his own wrong, and (ii) the cross-claim for damages for breach of contract for the same amount as that claimed whereby, on the ground of avoidance of circuity of action, judgment on the claim would be given for the cargo owners.

Schloss v. *Walter Heriot* (1863) 14 C.B.N.S. 59; *The Ettrick* (1881) 6 P.D. 127; *Strang, Steel & Co.* v. *A. Scott & Co.* (1889) 14 App.Cas. 601; 5 T.L.R. 705 applied.

(*b*) "Fault" was a legal wrong which was actionable as between the parties at the time when the general average sacrifice or expenditure was made, and there was, therefore, a "fault" on the part of the shipowners.

The Carron Park (1890) 15 P.D. 203; 6 T.L.R. 474 and *Louis Dreyfus & Co.* v. *Tempus Shipping Co.* [1931] A.C. 726; 47 T.L.R. 542 applied.

Milburn & Co. v. *Jamaica Fruit Importing and Trading Co. of London* [1900] 2 Q.B. 540; 16 T.L.R. 515 considered.

(3) That the third paragraph of article III, rule 6, of the Hague Rules brought about a discharge of liabilities and not a barring of defences, and therefore the equitable defence of the cargo owners was not affected and was available to defeat the shipowners' claim. Nor did time run against the cargo owners in respect of their cross-claim for damages, for "loss or damage" in article III, rule 6, meant loss or damage which was related to the cargo owners' goods and matters related to general average contribution were outside the scope of such limitations. The cargo owners' cross-claim, therefore, could be set up against the shipowners' claim when, to avoid circuity of action, judgment would be given for the cargo owners.

G. H. Renton & Co. Ltd. v. *Palmyra Trading Corporation of Panama* [1957] A.C. 149; [1956] 3 All E.R. 957 and *Anglo-Saxon*

Petroleum Co. Ltd. v. *Adamastos Shipping Co. Ltd.* [1957] 2 Q.B. 233; [1957] 1 All E.R. 673 considered.

The shipowners, accordingly, were not entitled to recover contribution in general average from the cargo owners.

Case stated by an arbitrator (Eustace Roskill Q.C.).

The claimant shipowners, Goulandris Brothers Ltd., the owners of the s.s. *Granhill*, chartered the vessel to Palm Line Ltd. for one West African round voyage under a time charterparty dated September 19, 1950. Whilst on service under the charterparty the vessel loaded at Lagos certain goods, namely, 140 pieces prime quality obeche flitches, which at all material times were the property of the respondent cargo owners. A bill of lading was issued by or on behalf of the shipowners dated at Lagos, December 3, 1950, in respect of the goods which, by its terms, were to be delivered at London. By clause 9 of the bill of lading: "General Average. General average payable according to the "York-Antwerp Rules, 1950, and any amendment thereof. In "the event of accident, danger, damage or disaster before or after "the commencement of the voyage, resulting from any cause "whatsoever whether due to negligence or not, for which or for "the consequence of which the carrier is not responsible, by "statute, contract or otherwise, the goods, shipper, consignee "and/or owner of the goods shall contribute with the carrier in "general average to the payment of any sacrifices, losses or "expenses of a general average nature that may be made or "incurred and shall pay salvage and special charges incurred in "respect of the goods." There was also a clause rubber-stamped on the face of the bill of lading providing "Reference herein con-"tained to the York-Antwerp Rules of General Average are to be "read as reference to the York-Antwerp Rules, 1950." The bill of lading was admittedly subject to the Hague Rules as in force at Lagos by virtue of the (Nigerian) Carriage of Goods by Sea Ordinance (No. 1 of 1926), the relevant provisions of which are identical with the corresponding provisions of the Carriage of Goods by Sea Act, 1924, of the United Kingdom.

Between Lagos and London the vessel suffered a casualty and general average expenditure was incurred by the shipowners. A general average adjustment was duly prepared showing the cargo owners' proportion to be £22 10s. 4d., which sum the shipowners claimed from the cargo owners. The cargo owners denied all liability to contribute and the matter was referred to arbitration.

The following were among the facts found by the arbitrator. On October 26, 1950, the vessel sailed from Liverpool under the time charterparty outward bound for West Africa. On November 3 she called at Dakar, and from November 11 to 23 was at Sapele, where she loaded a part cargo, and where some work was done to her port boiler. Whilst at Sapele the port boiler was filled with river water which contained a very large quantity of mud, and the starboard and centre boilers were topped up with similar river water. All the river water was fed directly into the boilers instead of into feed tanks and thence into the boilers through filters, and the vessel's engine-room staff were negligent in so feeding river water direct to all the boilers. On November 25 the vessel arrived at Lagos, where she remained until December. Whilst there she loaded, inter alia, the goods in question, and the bill of lading was duly issued. She left Lagos on December 3, and, having called at three other ports, called and bunkered at Las Palmas, whence she proceeded to London. On January 3, 1951, whilst on passage to London, trouble developed in the starboard boiler. The vessel proceeded on her port and centre boilers, but on January 7, 1951, when she was in the Bay of Biscay the furnaces of the port boiler collapsed. The vessel was taken in tow to Falmouth whence she was towed to London, where she discharged from January 15 to January 31, 1951. The goods were physically undamaged. The shipowners claimed £22 10s. 4d. contribution in general average expenditure which they had incurred in the above circumstances.

The cause of the collapse of the port boiler furnaces on January 7, 1951, was the presence of sludge in the port boiler resulting from the direct feeding of river water at Sapele into the port boiler, and, accordingly, the vessel was unseaworthy before and at the beginning of the voyage from Lagos, and the shipowners, their servants and agents before and at the beginning of that voyage failed to exercise due diligence to make her seaworthy. If the shipowners, their servants or agents had not so failed to exercise due diligence to make the vessel seaworthy, the furnaces of the port boiler would not have collapsed, and if they had not collapsed the general average expenditure claimed would not have been incurred. The failure to exercise due diligence to make the vessel seaworthy was therefore the cause of the general average expenditure being incurred.

The shipowners contended that nevertheless they were still entitled to maintain their claim by virtue of the operation of rule D of the York-Antwerp Rules, 1950,[1] and of article III, rule 6, of the Hague Rules.[1] Their contention was that rule D, whether read alone or in conjunction with the Rule of Interpretation, entitled a shipowner, notwithstanding his "fault," to maintain his claim for contribution in general average against other parties to the adventure, these other parties being left under the second part of the rule to their "remedies," if any, against the shipowner in respect of the "fault"; that the cargo owners' "remedies" in the present case were a cross-claim for damages for breach of the contract of carriage, which, being a claim for "loss or damage" within the meaning of those words in article III, rule 6, of the Hague Rules was barred by effluxion of time under that article; and that, therefore, the shipowners had their rights under the first part of rule D while the cargo owners had no "remedies," so that the shipowners could maintain and enforce their claim, notwithstanding that but for their "fault" the general average expenditure would never have been incurred.

The arbitrator rejected the contentions of the shipowners and, holding that they were not entitled to recover the £22 10s. 4d. from the cargo owners in respect of contribution in general average, awarded in favour of the cargo owners.

John Donaldson for the claimant shipowners. Under the first part of rule D of the York-Antwerp Rules, 1950, a shipowner is entitled to maintain a claim for general average contribution against the other parties to the venture notwithstanding that it was his "fault" which gave rise to the expenditure, while under the second part of the rule the other parties are left to their "remedies," if any, against the shipowner in respect of his "fault." At common law a claim by a shipowner for general average contribution where the necessity for the general average expenditure arose through his own fault will fail either on the equitable ground that a person may not derive benefit from his own fault or on the ground of circuity of action. [Reference was made to *Hain Steamship Co. Ltd.* v. *Tate & Lyle Ltd.*[2]; *Strang, Steel & Co.* v. *A. Scott & Co.*[3]; *The Ettrick*[4]; *The Carron Park*[5]; Carver on Carriage of Goods by Sea, 10th ed. (1957), p. 588, and Scrutton on Charterparties, 16th ed. (1955), p. 535, n. (*e*).] But the rules constitute a complete and comprehensive code which, when they have been adopted by the parties to a contract, excludes the common law. Their construction should be approached in the same manner as in the case of a codifying statute, and without reference to the previous state of the law: see *Anglo-Grecian Steam Trading Co. Ltd.* v. *T. Beynon & Co.*,[6] *Vlassopoulos* v. *British and Foreign Marine Insurance Co.*[7] and *Bank of England* v. *Vagliano Brothers*,[8] *per* Lord Herschell.[9] An international set of rules drawn up by an international convention should not be given an artificial construction in order to make them conform to English law, and the rule of interpretation, introduced in 1950, is an express exclusion of English common law.

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[1] York Antwerp Rules, 1950: "Rule of Interpretation. In the "adjustment of general average com-"pensation the following lettered and "numbered rules shall apply to the "exclusion of any law and practice "inconsistent therewith. Except as "provided by the numbered rules, "general average shall be adjusted "according to the lettered rules. "Rule B. General average sacrifices "and expenses shall be borne by the "different contributing interests on "the basis hereinafter provided. "Rule D. Rights to contribution in "general average shall not be "affected, though the event which "gave rise to the sacrifice or expen-"diture may have been due to the "fault of one of the parties to the "adventure; but this shall not pre-"judice any remedies which may be "open against that party for such "fault."

Hague Rules, Art. III, r. 6: "Unless notice of loss or damage "and the general nature of such loss "or damage is given in writing to "the carrier or his agent at the port "of discharge before or at the time "of the removal of the goods into "the custody of the person entitled "to delivery thereof under the con-"tract of carriage, or, if the loss or "damage be not apparent, within three "days, such removal shall be prima "facie evidence of the delivery by "the carrier of the goods as described "in the bill of lading . . . In any "event the carrier and the ship shall "be discharged from all liability in "respect of loss or damage unless "suit is brought within one year "after delivery of the goods or the "date when the goods should have "been delivered."

There is nothing in any of the rules to the effect that a shipowner shall not be entitled to compensation if the event giving rise to the necessity for the general average expenditure was a breach of the contract of carriage. Rule A, which deals with what is a general average act, makes no reference to the circumstances giving rise to that act, nor do any of the other rules, which are concerned with the steps to be taken: see, in particular, rules 15, 16 and 18, and contrast rule 9, which makes provision for one specific breach of contract—failure to provide an ample supply of fuel. Business efficacy requires that the first part of rule D should be general in its terms so that at the moment of emergency it is immaterial whether it is the ship or the cargo which is sacrificed, and the master of the ship has an unfettered discretion. [Reference was also made to Lowndes and Rudolf's Law of General Average and the York-Antwerp Rules, 7th ed. (1948), p. 11.] At the end of a voyage during which general average expenditure has been incurred the master has a lien on the goods of the cargo owners: *Crooks* v. *Allan.*[10] But if the right to compensation is to be affected by technical questions as to a possible breach of the contract of carriage, the master might not know whether there was an enforceable lien. On the construction of rule D now advanced, the liability of a cargo owner to pay general average contribution to a shipowner does not prevent the cargo owner from claiming a like amount from the shipowner under a different head, but the rule effects a complete separation between the two claims. It is clear from the second part of the rule that the general average adjustment is to include all claims, and the shipowners, therefore, on incurring the expenditure, have a right to contribution defeasible not by the equitable defence available at common law but by the cargo owners' remedies within the second part of the rule. *Louis Dreyfus & Co.* v. *Tempus Shipping Co.*[11] is not an authority to the contrary; the argument now being advanced was in that case abandoned in the Court of Appeal [12] because there it was no answer to the defence of circuity of action; the decision of Wright J.[13] was reversed on another ground, so that the rule has never been considered as an exceptions clause.

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[2] (1934) 39 Com.Cas. 259; (1936) 41 Com.Cas. 350; 52 T.L.R. 617; [1936] 2 All E.R. 597.

[3] (1889) 14 App.Cas. 601; 5 T.L.R. 705.

[4] (1881) 6 P.D. 127.

[5] (1890) 15 P.D. 203; 6 T.L.R. 474.

[6] (1926) 24 Ll.L.Rep. 122.

[7] [1929] 1 K.B. 187; 44 T.L.R. 725.

[8] [1891] A.C. 107; 7 T.L.R. 333.

[9] [1891] A.C. 107, 144, 145.

"Remedies" in the second part of rule D does not mean a bar to a claim for compensation but a counterclaim. The equitable defence, therefore, is ousted by the rule, and any counterclaim by the cargo owners is in the present case defeated by the limitation of time in article III, rule 6, of the Hague Rules; in this respect reliance is placed on the meaning given to the words "loss or "damage" in article IV, rules 1 and 2, by Devlin J. in *Anglo-Saxon Petroleum Co. Ltd.* v. *Adamastos Shipping Co. Ltd.*[14] That does not mean that by delay a shipowner can put himself in a better position than if he had advanced a prompt claim, because it is open to a cargo owner to institute proceedings before time has expired under article III, rule 6, for a declaration that he is not liable to pay contribution in general average: see

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[10] (1879) 5 Q.B.D. 38.

[11] [1931] A.C. 726; 47 T.L.R. 542.

[12] [1931] 1 K.B. 195; 46 T.L.R. 643.

[13] [1930] 1 K.B. 699; 46 T.L.R. 286.

[14] [1957] 2 Q.B. 233; [1957] 1 All E.R. 673.

Hordern-Richmond Ltd. v. *Duncan.*[15] [Reference was also made to *George Wimpey & Co. Ltd.* v. *British Overseas Airways Corporation.*[16]] Alternatively, it would be open to a cargo owner to issue a writ claiming damages for breach of the contract of carriage, including in the damages the amount which he may be found liable to contribute in general average.

If "remedies" in rule D includes a defence, then it is conceded that circuity of action is a defence, but it is nevertheless submitted that it is a defence to which the limitation of time in article III, rule 6, applies. Circuity of action is analogous to a set-off, and it is a good answer to a plea of set-off that the debt sought to be set off is statute-barred. It may only be pleaded by way of defence when the amount claimed is exactly the same as that claimed in the action, and it then must be shown that the sum claimed could have been recovered by the defendant at the date of the writ: see *Charles* v. *Altin,*[17] *Aktieselskabet Ocean* v. *B. Harding & Sons Ltd.*[18] and *Owners of the S.S. Susan V. Luckenbach* v. *Admiralty Commissioners.*[19] Circuity of action, therefore, is based on a notional counterclaim, and counterclaims are within the statutes of limitation. The basis of the principle is the "scandalous absurdity," referred to by Jervis C.J. in *Charles* v. *Altin,*[20] if the court were to give effect to a demand and also to a like cross-demand, but if the cross-demand is barred by limitation of time, the demand remains.

John Megaw Q.C. and *John Wordie* for the respondent cargo owners. The conclusion at which the shipowners ask the court to arrive is unsupported by any authority as a complete proposition, and their contention requires careful scrutiny both because of its originality and the startling result to which it would lead; it is contrary not only to the existing practice of average adjusters and to the intentions of the framers of the rules (see Lowndes and Rudolf's Law of General Average and the York-Antwerp Rules, 8th ed. (1955), p. 389), but in its result would be contrary to the general principle of English law applicable in these cases. Further, it would be contrary to common sense that the position of a cargo owner should be adversely affected by the delay of a shipowner in launching his claim for general average contribution. A cargo owner who, as suggested, claimed a declaration that he would not be liable to contribute would be in the curious position of instituting proceedings without knowing whether any or how large a contribution would be assessed against him. As a matter of procedure it is doubtful whether the court would grant such a declaration. *Hordern-Richmond Ltd.* v. *Duncan* [21] is not in pari materia, and there is no case in which the court has been asked to declare that a claim which might be made in the future would be bad.

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[15] [1947] K.B. 545; 63 T.L.R. 193; [1947] 1 All E.R. 427.

[16] [1955] A.C. 169; [1954] 3 All E.R. 661.

[17] (1854) 15 C.B.Rep. 46.

[18] [1928] 2 K.B. 371; 33 Com.Cas. 277.

[19] [1951] P. 197; [1951] 1 T.L.R. 165; [1951] 1 All E.R. 753.

[20] 15 C.B.Rep. 46, 62.

In English law general average contribution is based on equitable principles; there is a right to share, but the law may refuse a remedy for that right to a wrongdoer: as to the general nature of general average contribution, see *Milburn & Co.* v. *Jamaica Fruit Importing and Trading Co. of London* [22]; see also *Strang, Steel & Co.* v. *A. Scott & Co.*,[23] where Lord Watson [24] said that it would be " manifestly unjust " to permit a wrongdoer to recover from those whose goods were saved. It would be manifestly unjust if the cargo owners in the present case had to pay to the shipowners part of the loss sustained as a consequence of the shipowners' breach of contract, and English law would prevent such an occurrence. Only the most compelling language should induce the court to construe the contract to produce such a result: *Parkinson (Sir Lindsay) & Co. Ltd.* v. *Commissioners of His Majesty's Works and Public Buildings*,[25] *per* Asquith L.J.,[26] and *Burton & Co.* v. *English & Co.*[27]

The purpose of rule D is to ensure that the general average adjustment will proceed without reference to any alleged fault so that the assessment of contribution is not delayed or prevented and there is an adjustment as between the innocent and allegedly guilty parties; questions of fact and law as to whether there has been a fault are not questions for the average adjuster and are kept outside the adjustment. The adjustment is not in itself a definition of legal rights and is in no way binding on any party; if one party refuses to accept it, then the party wishing to enforce it must prove his right in a court of law. At common law a claim for a general average contribution by a party fails either on the equitable principle that a person may not recover in respect of his own wrong or on the ground of circuity of action: there is no distinction in English law between the two grounds (*The*

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[21] [1947] K.B. 545.

[22] [1900] 2 K.B. 540; 16 T.L.R. 515.

[23] 14 App.Cas. 601.

[24] Ibid. 608.

[25] [1949] 2 K.B. 632; [1950] 1 All E.R. 208.

[26] [1949] 2 K.B. 632, 660.

[27] (1883) 12 Q.B.D. 218.

Ettrick[28]), and there is no reason why the word "remedies" in the second part of rule D should include a cross-action but not the equitable defence available under English law.

[PEARSON J. referred to *Vincent* v. *Southern Railway Co.*[29]]

"Remedies" has no technical meaning in English law. [Reference was also made to the Shorter Oxford English Dictionary (1944), vol. 2, p. 1699, and to Stroud's Judicial Dictionary, 3rd ed. (1953), vol. 3, p. 2529.]

The rules should not be construed as a self-contained code independent of the governing law of the contract. Rule D draws a clear and deliberate distinction between rights and remedies and does not give remedies where the governing law of the contract gives none, and the meaning of the word "remedies" is deliberately left to that law. Assuming, therefore, that the shipowners are right in saying that once general average circumstances are established a right to contribution arises, where the circumstances arose through breach of contract on the part of the claiming party, that right will not be enforceable in the English courts because English law does not allow such a claim. The position of a party who has a right but no remedy is well known to English law, e.g., where the claim is barred by a statute of limitation; and compare section 4 of the Sale of Goods Act, 1893. [Reference was also made to *Milburn & Co.* v. *Jamaica Fruit Importing and Trading Co. of London.*[30]] It is submitted, therefore, that the "rights" given by the first part of rule D, which are not to be affected by the "fault" of one of the parties, are the rights to come into the general average assessment as distinct from the right to receive payment, and that the phrase refers to the matters set out in the other rules which relate not to rights as such but to the machinery of average adjustment. Alternatively, the rules lay down how values are to be arrived at, but there is no definition of the persons who are to have the rights to contribution; like the meaning of the word "remedies," that is a matter for the governing law of the contract, and the "rights to "contribution" are the rights of those persons who under the governing law of the contract have a right to recover contribution.

What is a "fault" under rule D is also a matter for the governing law of the contract. Wright J. in *Tempus Shipping Co. Ltd.* v. *Louis Dreyfus & Co. Ltd.*[31] said that "fault" was not apt to excuse a breach of warranty of seaworthiness; the decision in that case turned on the very different words of section 502 of the

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[28] 6 P.D. 127.
[29] [1927] A.C. 430.
[30] [1900] 2 Q.B. 540.
[31] [1930] 1 K.B. 699, 706.

Merchant Shipping Act, 1894; that case is of no assistance, and in any event in this case there is an actionable fault. The same fundamental character attaches to the obligation to use due diligence as to a warranty of seaworthiness: see section 2 of the Carriage of Goods by Sea Act, 1924. It is submitted that a much stronger word than " fault " would be required to cover a breach of warranty of seaworthiness and that " fault " in rule D must mean " excused fault." [Reference was also made to the speeches of Lord Dunedin and Lord Atkin in *Louis Dreyfus & Co.* v. *Tempus Shipping Co.*[32] and to *Steel* v. *State Line Steamship Co.*[33]] Where there is ambiguity in a clause favouring one party by a departure from general principles, the clause should be construed as if there was no such departure: *Nelson Line (Liverpool) Ltd.* v. *James Nelson & Sons Ltd.*[34]: see also *Burton & Co.* v. *English & Co.*[35] and *Steel* v. *State Line Steamship Co.*[36]

In any event the third paragraph of article III, rule 6, of the Hague Rules is no bar either to the cargo owner's equitable defence or to his cross-claim. The rule discharges liabilities but does not bar defences. The words " loss or " damage " in the first sentence are plainly confined to physical loss or damage to goods, and there is no reason why the same words in the latter part of the rule should have a wider meaning. The whole framework of the rule shows that they are intended to have a physical facet. The rule supersedes normal limitation periods and discharges liability within a short time in favour of the shipowners and it must be construed narrowly. The wider meaning given to the words of article III, rule 8, in *G. H. Renton & Co. Ltd.* v. *Palmyra Trading Corporation of Panama*[37] was arrived at by a comparison with the other rules: see the speech of Lord Morton of Henryton.[38] Of all the other rules, article III, rule 6, is by its context the most clearly limited in scope. Devlin J. in *Anglo-Saxon Petroleum Co. Ltd.* v. *Adamastos Shipping Co. Ltd.*,[39] construing article IV, rule 1, said that there must be a relationship between the claim and the goods. Here that relationship, if any, is too remote. [Reference was also made to *Greenshields, Cowie & Co.* v. *Stephens & Sons Ltd.*[40] and *Tempus Shipping Co. Ltd.* v. *Louis Dreyfus & Co. Ltd.*[41]] The words " loss or damage " in article III, rule 6, are not apt to apply to matters of general average. Liability in general average is not in respect of goods. In any event, the defence of circuity of action is a matter of defence and not of counterclaim (*Schloss* v. *Walter Heriot* [42]), and there is nothing upon which article III, rule 6, can operate. [Reference was also made to *Charles* v. *Altin*.[43]]

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[32] [1931] A.C. 726, 731, 743.
[33] (1877) 3 App.Cas. 72.
[34] [1908] A.C. 16; 24 T.L.R. 114.
[35] 12 Q.B.D. 218.
[36] 3 App.Cas. 72.
[37] [1957] A.C. 149.
[38] Ibid. 169.
[39] [1957] 2 Q.B. 233, 255.
[40] [1908] A.C. 431; 24 T.L.R. 880.
[41] [1931] 1 K.B. 195.

Liability in general average contribution is not in respect of goods—it might be said that a general average claim is in respect of the ship and the goods are brought in as to value only. The master's lien on the goods is only a matter of machinery.

Donaldson, in reply, referred to *Hain Steamship Co. Ltd.* v. *Tate & Lyle Ltd.*[44] and to the judgment of Scrutton L.J. in *Tempus Shipping Co. Ltd.* v. *Louis Dreyfus & Co. Ltd.*[45] The right of a cargo owner to recover from a shipowner under rule D of the York-Antwerp Rules, 1950, is a cross-claim, not an equitable defence. In Webster's New International Dictionary (1928), vol. 2, p. 1803, the legal meaning of " remedy " is given as " The " legal means to recover a right, or to prevent, or to obtain redress " for, a wrong." " Remedies " in the latter part of rule D must mean the legal means of recovering a right and refers to the cargo owner's remedy against the shipowner, that is, a right to recover the cargo rather than the right to resist a claim to contribution. The latter is not a right but a defence, the proper word for which is " relief " not " remedy." Only in the very peculiar circumstances of circuity of action, which is a procedural freak and has nothing to do with the law of the sea, can a defence be a remedy. Circuity of action is in its nature a claim and as such is barred by article III, rule 6, of the Hague Rules. The only bar at common law to a claim for general average contribution is the equitable principle that a person may not recover in respect of his own wrong, but in the present case the parties have agreed that the rights of a party to contribution are not to be affected by his " fault."

The York-Antwerp Rules are not written into a contract but provide a comprehensive code outside the contract in accordance with which the parties have agreed to pay compensation; it is the right to receive payment in accordance with that code which the shipowners seek to enforce in this claim. The code is not to be construed against a background of English law: *Vlassopoulos* v. *British and Foreign Marine Insurance Co.*,[46] *Clarke* v. *Earl of*

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[42] (1863) 14 C.B.N.S. 59.

[43] 15 C.B.R. 46.

[44] 39 Com.Cas. 259.

[45] [1931] 1 K.B. 195, 201.

[46] [1929] 1 K.B. 187.

1957

GOULANDRIS BROTHERS LTD. *v.* B. GOLDMAN & SONS LTD.

Dunraven[47] and *The Beaverford (Owners)* v. *The Kafiristan (Owners)*[48]; but the word "fault" in rule D must be given its popular meaning. It is apt to excuse the breach of the contract of carriage by the shipowners in this case. [Reference was also made to *Tempus Shipping Co. Ltd.* v. *Louis Dreyfus & Co. Ltd.*,[49] *Steel* v. *State Line Steamship Co.*,[50] *Fairclough, Dodd and Jones Ltd.* v. *J. H. Vantol Ltd.*[51] and *James Shaffer Ltd.* v. *Findlay Durham and Brodie.*[52]] As to periods of limitation, see *Battley* v. *Faulkner.*[53]

The area covered by the words "loss or damage" in article III, rule 6, of the Hague Rules is not delineated; they are not followed by the words "the goods" and no assistance is to be derived from the decision in *G. H. Renton & Co. Ltd.* v. *Palmyra Trading Corporation of Panama.*[54] In any event, there is an intimate connexion between liability in general average and the goods, because the obligation to contribute runs with the goods.

Cur. adv. vult.

July 26. PEARSON J. read the following judgment: This is an award stated in the form of a special case pursuant to section 21 (1) (*b*) of the Arbitration Act, 1950. It raises questions of law which are intricate and difficult.

The claimants were at all material times the owners of a ship called the *Granhill*, which sailed from Liverpool on October 26, 1950, under a time charterparty to ports in West Africa. From November 11 to 23, 1950, she was at Sapele where a part cargo was loaded, and unfortunately some river water was used for filling the boilers. From November 25 to December 3, 1950, the ship was at Lagos and loaded cargo, including the respondents' goods which were for delivery in London under the bill of lading. When the ship was on the way to London in January, 1951, serious troubles developed in the boilers and she had to be towed first to Falmouth and then to London, where the cargo was discharged. The goods were undamaged but expenditure of a general average nature was incurred by the ship. A general average adjustment was duly prepared and it showed the respondents' proportion of the general average expenditure incurred by the claimants to be £22 10s. 4d. The claimants claimed that sum from the respondents, but the respondents denied liability, contending that the ship was unseaworthy and that due diligence had not been exercised to make her seaworthy before and at the beginning of the voyage from Lagos. The claimants denied these contentions.

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[47] [1897] A.C. 59; 13 T.L.R. 58.

[48] [1938] A.C. 136; 53 T.L.R. 1010; [1937] 3 All E.R. 747.

[49] [1930] 1 K.B. 699.

[50] 3 App.Cas. 72.

[51] [1957] 1 W.L.R. 136; [1956] 3 All E.R. 921.

[52] [1953] 1 W.L.R. 106.

[53] (1820) 3 B. & Ald. 288.

[54] [1957] A.C. 149.

On the issues of unseaworthiness and due diligence the arbitrator found the following facts which are set out in paragraph 10 of the award: "(1) The port boiler was filled at Sapele with "river water which contained a very large quantity of mud. The "starboard and centre boilers were 'topped up' at Sapele with "similar river water. (2) All such river water so used at Sapele "was fed directly into all the boilers instead of into the feed tanks "and thence into the boilers through filters. (3) The vessel's "engine-room staff were negligent in so feeding river water direct "to all the boilers. (4) The sludge found in London in the port "boiler was caused by the vessel's engine-room staff having "negligently fed river water at Sapele direct into the port boiler. "(5) The traces of sludge found in London in the starboard and "centre boilers were caused by the vessel's engine-room staff "having negligently fed river water at Sapele direct to the star-"board and centre boiler to top them up. (6) The cause of the "collapse of the port boiler furnaces on January 7, 1951, was the "presence of sludge in the port boiler resulting from the direct "feeding of river water at Sapele into the port boiler. (7) The "vessel accordingly was unseaworthy before and at the beginning "of the voyage from Lagos and the claimants, their servants and "agents before and at the beginning of that voyage failed to "exercise due diligence to make her seaworthy. (8) If the "claimants, their servants or agents had not so failed to exercise "due diligence to make the vessel seaworthy, the furnaces of the "port boiler would not have collapsed, and if they had not col-"lapsed the general average expenditure, contribution towards "which was claimed by the claimants, would not have been "incurred. The said failure to exercise due diligence to make "the vessel seaworthy was therefore the cause of the general "average expenditure in question being incurred."

The respondents' contention is that on those findings of unseaworthiness and failure to exercise due diligence the claimants' claim for contribution in general average must be rejected. The claimants, however, contend that they are still entitled to maintain their claim by virtue of the operation of rule D of the York-Antwerp Rules, 1950, and the third paragraph of article III, rule 6, of the Hague Rules.

The question of law stated for the decision of the court is whether, upon the facts found and on the true construction of the contract, the claimants are entitled to recover the sum of £22 10s. 4d. from the respondents as contribution in general average. The arbitrator's award was in favour of the respondents, subject to the decision of the court on this special case.

The first paragraph of clause 9 of the bill of lading provides: "General average payable according to the York-Antwerp Rules, "1950, and any amendment thereof." Rule D of the York-Antwerp Rules, 1950, provides: "Rights to contribution in "general average shall not be affected, though the event which "gave rise to the sacrifice or expenditure may have been due to "the fault of one of the parties to the adventure; but this shall "not prejudice any remedies which may be open against that "party for such fault."

By virtue of a clause in the bill of lading and the Nigerian Carriage of Goods by Sea Ordinance, No. 1 of 1926, the bill of lading was subject to the Hague Rules. The third paragraph of article III, rule 6, of the Hague Rules, provides: "In any event "the carrier and the ship shall be discharged from all liability in "respect of loss or damage unless suit is brought within one year "after delivery of the goods or the date when the goods should "have been delivered."

The argument put forward by Mr. Donaldson for the claimants was to this effect: (1) Under the first part of rule D the claimants have a right to contribution in general average which is not affected by the fact that the event which gave rise to the general average expenditure was due to the fault of the claimants. (2) The remedy, which was originally open to the respondents for the fault of the claimants, and was preserved by the second part of rule D, was to sue the claimants for damages for breach of the contract of carriage, claiming as damages the amount of the general average contribution payable by the respondents to the claimants. (3) So long as the respondents' claim for damages for breach of contract remained enforceable, an action by the claimants against the respondents for the general average contribution could be met and defeated by the respondents setting up their claim for damages equal to the amount of the contribution, and the court in such a case would give judgment for the respondents on the claimants' claim in order to avoid circuity of action. (4) But the respondents' claim for damages for breach of contract has become unenforceable because it was a claim "in respect of "loss or damage" within the meaning of the third paragraph of rule 6 of article III of the Hague Rules, and, as no suit was brought within the year after the delivery of the goods, or the date when the goods should have been delivered, the claimants have been discharged from all liability in respect of the loss or damage. (5) Therefore, now the position is that the claimants still have their right to general average contribution and the respondents no longer have anything to set against it, so that no question of circuity arises, and the claimants are entitled to recover from the respondents the amount of the contribution, which is £22 10s. 4d. That was Mr. Donaldson's argument for the claimants.

It was suggested to Mr. Donaldson that his argument, if correct, would produce unreasonable results, in that the cargo owner has originally a good defence to the shipowners' claim on the ground that the general average expenditure was caused by the fault of the shipowners but the shipowner, by merely deferring the issue of his writ for a year, can deprive the cargo owner of that defence. Mr. Donaldson's answer was that the cargo owner could protect his interest by bringing an action within the year against the shipowner, even though the shipowner had not yet brought any action or made any claim against the cargo owner. As to the nature of such action by the cargo owner, Mr. Donaldson had two suggestions. First, he suggested that the cargo owner's action should be for a declaration of non-liability, and he contended that it would be analogous to the declaration which was made in *Hordern-Richmond Ltd.* v. *Duncan*.[1] In that case the action was brought against a person who had been driving a lorry as servant of a public authority and was, therefore, entitled to the one-year period of limitation under the Limitation Act, 1939, and the declaration asked for and granted was that "in the "event of any proceedings for damages being instituted against "these plaintiffs, their servants or agents in respect of the "accident mentioned in the pleadings in this action, they shall "be entitled to claim indemnity or contribution against the "present defendant pursuant to the Law Reform (Married "Women and Tortfeasors) Act, 1935, s. 6, in respect of any "damage or costs that may be awarded against them." But that case does not go so far as the suggested action of the cargo owner in this case, for a possible future defendant would be suing a possible future plaintiff for a declaration that the possible future claim, if it is ever made, will be invalid. The court would be at least very reluctant to grant any such declaration. One difficulty is that if Mr. Donaldson's other contentions are right, the possible future claim, though invalid at an early date, would become valid at a later date after the lapse of time had destroyed the defence to it.

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[1] [1947] K.B. 545.

The second suggestion was that the cargo owner should bring against the shipowner an action for damages for breach of the charterparty, and should include in the damages the amount of the cargo owner's liability to the shipowner for general average contribution. That is a more promising method and safer on the legal side, because if a breach of contract could be proved, the plaintiff would be entitled to at least nominal damages. However, this method is not free from difficulties because the plaintiff would be unable to quantify his claim until after the compilation of the average adjustment, and normally he should not start an action unless he intended to proceed with it, and proceeding with it would involve the expense of proving that there was a fault on the part of the ship, and that that fault caused the casualty. Moreover, in some cases, where there was both damage to the ship and damage to the cargo, it might be impossible to know, until after the average adjustment had been compiled, which party would on balance be owing a contribution to the other. Also a cargo owner, if he did not happen to take legal advice at the earliest stage, would not be expected to realize that he had to bring an action forthwith, not for the purpose of gaining any positive relief or because he had any complaint as to the existing situation, but for the purpose of maintaining unimpaired the validity of his just defence against a possible future claim not yet made or threatened. In my view, there are elements not only of inconvenience but even of absurdity in the results which would follow if the claimants' contentions were accepted. That is not, in itself, a sufficient reason for rejecting the contentions but does prompt a careful scrutiny of them.

Questions were raised in the special case and in the argument as to the relationship between the York-Antwerp Rules and the English common law. Mr. Donaldson contended that the York-Antwerp Rules are in the nature of a code, and he cited a passage in the speech of Lord Herschell in *Bank of England* v. *Vagliano Brothers*.[2] Lord Herschell had been referring to such a statute as the Bills of Exchange Act, which was intended to be a code of the law relating to negotiable instruments. He said[3]: "I

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[2] [1891] A.C. 107.

[3] Ibid. 144, 145.

"think the proper course is in the first instance to examine the "language of the statute and to ask what is its natural meaning, "uninfluenced by any considerations derived from the previous "state of the law, and not to start with inquiring how the law "previously stood, and then, assuming that it was probably "intended to leave it unaltered, to see if the words of the enact-"ment will bear an interpretation in conformity with this view."

It was further argued that the York-Antwerp Rules, being an international set of rules drawn up by an international convention, are for that reason also not to be presumed to have the same effect as the English common law, and should not be artificially construed in an endeavour to make them conform to the English common law. In my view, those contentions are right in principle. But I also agree with Mr. Megaw when he says that, on examining the provisions of the York-Antwerp Rules, you find that they do not constitute a complete or self-contained code, and need to be supplemented by bringing into the gaps provisions of the general law which are applicable to the contract. I will give examples of that later. The York-Antwerp Rules have not in themselves any legal force. The parties to a contract can, if they so choose, agree that general average shall be payable according to the York-Antwerp Rules. But the parties have freedom of contract: they could agree not to adopt the York-Antwerp Rules or agree to adopt them with express modifications or agree to adopt them with implied modifications. In this case there is no express modification and I do not think that there is any implied modification.

The first of the York-Antwerp Rules is the rule of interpretation, which provides: "In the adjustment of general average "the following lettered and numbered rules shall apply to the "exclusion of any law and practice inconsistent therewith. "Except as provided by the numbered rules, general average "shall be adjusted according to the lettered rules." Rule D has already been read, but for convenience I will read it again: "Rights to contribution in general average shall not be affected, "though the event which gave rise to the sacrifice or expenditure "may have been due to the fault of one of the parties to the "adventure; but this shall not prejudice any remedies which "may be open against that party for such fault."

There is not in these rules any definition of the word "fault," and, therefore, the meaning which the word is to bear in these rules as applying to the present contract must be determined by the general law covering the present contract. If different general laws give different meanings to the word "fault" that is an unavoidable lack of uniformity. Similarly the rules do not give any definition or list or indication of the remedies which may be open against a party whose fault has caused the event which gave rise to the general average sacrifice or expenditure. To ascertain what the remedies are you must go to the general law covering the contract, which in the present case is English law.

Another question is as to the relationship between the first part of rule D and the second part of it. In my view the manifest objects of rule D are to keep all questions of alleged fault outside the average adjustment and to preserve unimpaired the legal position at the stage of enforcement. The effect of the first part of the rule is that the average adjustment is compiled on the assumption that the casualty has not been caused by anybody's fault. The convenience of this arrangement appears when regard is had to the size and complexity that an average adjustment may attain. The average adjustment in the present case covers 183 pages and the compilation would involve much collection of information and many calculations. I understand that the task of compiling an average adjustment in a complicated case may take years. It is highly convenient and desirable, almost necessary, that the task should not be further enlarged and complicated by questions whether the casualty was caused by some fault or faults of one or more of the parties. Moreover, such questions would naturally be settled by litigation or arbitration, as they go beyond the sphere of general average and may affect other matters. The average adjusters ought to be able to produce figures which, so far as they are concerned, are final figures. When they have produced their final figures, the question of enforcement arises, and it is at this stage that the second part of rule D comes into play. The average adjustment shows X owing to Y £100, but that showing is without prejudice to any remedies which may be open to X for Y's fault having caused the casualty. In my view that is clearly the intended mode of operation of the two parts of rule D, and it affords the clue to the interpretation of the rule. The first part refers to the rights to contribution in general average as they will be set out in the average adjustment, and these are properly and naturally called "rights," because normally the holder of such rights is entitled to receive payment. But the second part of the rule provides that the first part is not to prejudice remedies for faults. That implies that in some cases the remedies referred to in the second part of the rule will override the rights referred to in the first part; in other words, the second part operates as a proviso, qualifying, overriding, cutting down or derogating from the first part. The rights may be nullified or defeated or diminished or otherwise affected by the remedies. In that sense the rights referred to in the first part of the rule are prima facie rights because they are subject to the remedies.

The position, therefore, is that the claimants have their prima facie right to recover from the respondents contribution in general average, but the respondents may be able to defeat that right by using their "remedies" for the claimants' "fault." As I have said, the York-Antwerp Rules are silent as to what are the remedies and what is a fault, and for elucidation of those matters it is necessary to have resort to the English law.

There is the case of *Schloss* v. *Walter Heriot*,[4] and the headnote, so far as material, states[4]: "To an action by a "shipowner against a shipper of goods to recover his proportion "of average loss, the defendant pleaded . . . that the ship was "unseaworthy at the commencement of the voyage, and that the "average loss was occasioned and arose from and in consequence "of such unseaworthiness. *Held*, a good plea, inasmuch as it "showed that the plaintiff's actionable negligence and misconduct "produced the very damage for which he sought to recover "contribution from the defendants; and (probably) also on the "ground of avoidance of circuity of action."

There is an interesting citation in the argument[5] from Kent's Commentaries, vol. 3, p. 232, where it says: "By the Rhodian "law, as cited in the Pandects (Dig. 14.2.1), if goods were thrown "overboard, in a case of extreme peril, to lighten and save the "ship, the loss, being incurred for the common benefit, was to "be made good by the contribution of all. The goods must not "be swept away by the violence of the waves, for then the loss "falls entirely upon the merchant or his insurer, but they must "be intentionally sacrificed by the mind and agency of man, "for the safety of the ship and the residue of the cargo. The "jettison must be made for sufficient cause, and not from groundless timidity. It must be made in a case of extremity, when "the ship is in danger of perishing by the fury of a storm, or "is labouring upon rocks or shallows, or is closely pursued by "pirates or enemies; and then, if the ship and the residue of the "cargo be saved by means of the sacrifice, nothing can be more "reasonable than that the property saved should bear its proportion of the loss. The doctrine of general average is one of

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[4] (1863) 14 C.B.N.S. 59.

[5] Ibid. 62.

"those rules of the marine law which is built upon the plainest "principles of justice; and it has, accordingly, recommended "itself to the notice and adoption of all the commercial nations "of the world." Then Erle C.J. gave judgment as follows[6]: "The fourth plea I think is a good one. It shows that the "plaintiff was himself the cause of the loss,—that his actionable "negligence and misconduct produced the very damage for which "he seeks to recover contribution from the defendants. Further, "I am of opinion, that, if necessary, the plea is sustainable on "the ground that the defendants would be entitled in a cross-"action to recover back the whole sum claimed by the plaintiff "in this action." Willes and Keating JJ. concurred.

The next in the case law is *The Ettrick.*[7] The headnote states: "The payment into court of £8 a ton under 25 and "26 Vict. c. 63, s. 54, does not place the shipowner in the "position of a person who has not done wrong. The owner of "a ship sunk by a collision in the Thames admitted it to be "his fault, and paid into court £8 a ton in a suit to limit his "liability. The Thames Conservators, having powers under the "Removal of Wrecks Act, 1877, and the Thames Conservancy "Acts, raised the ship and delivered the ship and cargo to the "owner, he undertaking to pay the expense of raising. Part of "the cargo was some wool, which was damaged by being sunk:— "Held, that the shipowner was bound to deliver the wool to the "owner of the wool without claiming from him, by way of con-"tribution to salvage, any part of the expenses of raising the ship "and cargo." Brett L.J. said[8]: "A general average contribu-"tion is a contribution in money paid to a person who has been "obliged to pay for a general average loss. If the plaintiff had "not been in any fault, I am inclined at present to think that "he would have been entitled to claim from the defendant if it "was a general average contribution. But he has been in fault, "and the authorities are decisive that if the general average "contribution which he claims is a general average contribution, "which arose by reason of a default of his, he cannot claim "anything. Therefore, taking it to be a claim for a general "average contribution, he is ousted by the authorities, because "the loss was a loss occasioned by his own default." Cotton L.J. said[9]: "Then, independently of the contract, what are the rights "of the parties? I take it, first of all, without reference to the

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[6] 14 C.B.N.S. 59, 64.

[7] (1881) 6 P.D. 127.

[8] Ibid. 135.

[9] Ibid. 137.

"Thames Conservancy Act, but treating this as in the nature of "a general average contribution, that the claim is one founded "on equity, namely, that where a person has incurred expense "for the general benefit of the whole adventure he shall claim "contribution from all those who are interested. But it would "be against equity to say that the person who himself has done "the wrongful act which caused the expenditure shall claim "thereupon from anybody else, and the cases have decided "accordingly that where the expense has been incurred in conse-"quence of the wrongful act of the person who incurred it, he "cannot claim contribution in the way of general average."

In that case there would not have been circuity of action because the shipowner had limited his liability. Therefore, the decision rested on the ground that a person shall not recover from any other person in respect of the consequences of his own wrong. That may be called for convenience the equitable defence, although it has no special connexion with the Court of Chancery. Clearly it is a matter of defence and not of cross-claim.

Then there is the case of *Burton & Co.* v. *English & Co.*[10] The headnote is: "It was stipulated in a charterparty that the "'ship should be provided with a deck cargo if required at full "'freight, but at merchant's risk':—*Held*, reversing the decision "of the Queen's Bench Division, that the words 'at merchant's "'risk' did not exclude the right of the charterers to general "average contribution from the shipowners in respect of deck "cargo, shipped by the charterers, and necessarily jettisoned to "save the ship and the rest of the cargo." The interest of the case for the present purpose is in what is said about the foundation of the law of general average contribution, whether it is essentially of a contractual nature or whether it really rests on the old law of the sea and is based upon what Cotton L.J.[11] called the equitable considerations. Brett M.R. said[12]: "By "what law does the right arise to general average contribution? "Lord Bramwell in his judgment in *Wright* v. *Marwood*[13] con-"siders it to arise from an implied contract, but although I "always have great doubt when I differ from Lord Bramwell, "I do not think that it forms any part of the contract to carry, "and that it does not arise from any contract at all, but from "the old Rhodian laws, and has become incorporated into the "law of England as the law of the ocean. It is not as a matter "of contract, but in consequence of a common danger, where

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[10] (1883) 12 Q.B.D. 218.
[11] 6 P.D. 127, 137.
[12] 12 Q.B.D. 218, 220.
[13] (1881) 7 Q.B.D. 62, 67.

"natural justice requires that all should contribute to indemnify "for the loss of property which is sacrificed by one in order that "the whole adventure may be saved. If this be so, the liability "to contribute does not arise out of any contract at all, and is "not covered by the stipulation in the charterparty on which "the defendants rely. I therefore disagree with the decision of "the Divisional Court in this case." Bowen L.J. said,[14] with regard to this question: "But does it cover this claim for general "average contribution? What is this claim, and how does it "arise? In the investigation of legal principles the question "whether they arise by way of implied contract or not often ends "by being a mere question of words. General average contribution is a principle which comes down to us from an anterior "period of our history, and from the law of commerce and the "sea. When, however, it is once established as part of the law, "and as a portion of the risks which those who embark their "property upon ships are willing to take, you may if you like "imagine that those who place their property on board a ship on "the one side, and the shipowner who puts his ship by the quay "to receive the cargo on the other side, bind themselves by an "implied contract which embodies this principle, just as it may "be said that those who contract with reference to a custom "impliedly make it a portion of the contract. But that way, "although legally it may be a sound way, nevertheless is a technical way of looking at it. This claim for average contribution, "at all events, is part of the law of the sea."

Then there is another case, *Strang, Steel & Co.* v. *A. Scott & Co.*,[15] before the Judicial Committee. The essence of the problem which faced the court appears in a sentence which states[16]: "The learned judge found, as matter of fact, "that the stranding of the ship upon the Baragua Flats was "occasioned by the negligent navigation of the master; and "he held, as matter of law, that no claim for general average "arises to the owners of cargo jettisoned when the peril which "necessitated jettison is induced by the fault of the ship." One finds in later passages[17] that there was considerable textbook authority for the view which the judge of first instance (the Recorder of Rangoon) had taken, but his view was not accepted by the Judicial Committee. Lord Watson, delivering the opinion of the Judicial Committee, said[18]: "Whether the rule ought to

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[14] 12 Q.B.D. 218, 223.
[15] (1889) 14 App.Cas. 601.
[16] Ibid. 605.
[17] Ibid. 610.
[18] Ibid. 607, 608.

"be regarded as matter of implied contract, or as a canon of "positive law resting upon the dictates of natural justice, is a "question which their Lordships do not consider it necessary to "determine. The principle upon which contribution becomes "due does not appear to them to differ from that upon which "claims of recompense for salvage services are founded. But, "in any aspect of it, the rule of contribution has its foundation "in the plainest equity. In jettison, the rights of those entitled "to contribution, and the corresponding obligations of the contributors, have their origin in the fact of a common danger "which threatens to destroy the property of them all; and these "rights and obligations are mutually perfected whenever the "goods of some of the shippers have been advisedly sacrificed, "and the property of the others has been thereby preserved. "There are two well-established exceptions to the rule of contribution for general average, which it is necessary to notice. "When a person who would otherwise have been entitled to claim "contribution has, by his own fault, occasioned the peril which "mediately gave rise to the claim, it would be manifestly unjust "to permit him to recover from those whose goods are saved, "although they may be said, in a certain sense, to have benefited "by the sacrifice of his property. In any question with them "he is a wrongdoer, and, as such, under an obligation to use "every means within his power to ward off or repair the natural "consequences of his wrongful act. He cannot be permitted to "claim either recompense for services rendered, or indemnity "for losses sustained by him, in the endeavour to rescue property "which was imperilled by his own tortious act, and which it "was his duty to save. *Schloss* v. *Heriot*[19] is the leading "English authority upon the point. In that case, which was an "action by the shipowner against the owners of cargo for contribution in an average loss, a plea stated in defence, to the effect "that the ship was unseaworthy at the commencement of the "voyage, and that the average loss was occasioned by such unseaworthiness, was held to be a good answer to the claim by Chief "Justice Erle and Willes and Keating JJ." Then he went on to say[20]: "The second exception is in the case of deck cargo," and I need not refer to that. Then he said[21]: "It appears from "the proceedings in this suit that the average claims at the "instance of cargo owners exceed $30,000, and that there is "a small claim on account of ship. The fault of the master

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[19] 14 C.B.N.S. 59.

[20] 14 App.Cas. 601, 608.

[21] Ibid. 609.

"being matter of admission, it seems clear, upon authority, that "no contribution can be recovered by the owners of the *Abington*, unless the conditions ordinarily existing between parties "standing in that relation have been varied by special contract "between them and their shippers. But the negligent navigation "of the master cannot, in the opinion of their Lordships, afford "any pretext for depriving those shippers whose goods were "jettisoned of their claim to a general contribution. They were "not privy to the master's fault, and were under no duty, legal "or moral, to make a gratuitous sacrifice of their goods, for the "sake of others, in order to avert the consequences of his fault. "The Rhodian law, which in that respect is the law of England, "bases the right of contribution not upon the causes of the "danger to the ship and cargo, but upon its actual presence; "and such exceptions as that recognized in *Schloss* v. *Heriot* [22] "are in truth limitations on the rule, which have been intro-"duced, from equitable considerations, in the case of actual "wrongdoers, or of those who are legally responsible for them. "The owners of goods thrown overboard having been innocent "of exposing the *Abington* and her cargo to the sea peril which "necessitated jettison, their equitable claim to be indemnified "for the loss of their goods is just as strong as if the peril had "been wholly due to the action of the winds and waves."

A later case illustrating or recognizing the same points is *Tempus Shipping Co. Ltd.* v. *Louis Dreyfus & Co. Ltd.*,[23] in the King's Bench Division and in the Court of Appeal,[24] and then in the House of Lords under the name of *Louis Dreyfus & Co.* v. *Tempus Shipping Co.*[25] There is a further case of *Hain Steamship Co. Ltd.* v. *Tate & Lyle Ltd.*[26]

The equitable defence, as I am calling it, embodying the principle that a person cannot recover from any other person in respect of the consequences of his own wrong will be found in another branch of the law, or in a different application of the law, in *Vincent* v. *Southern Railway Co.*,[27] and in *Smith* v. *Baveystock & Co. Ltd.*[28] Other cases on circuity of action are *Charles* v. *Altin*,[29] *The Glenfruin*,[30] *Aktieselskabet Ocean* v. *B.*

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[22] 14 C.B.N.S. 59.

[23] [1930] 1 K.B. 699; 46 T.L.R. 286.

[24] [1931] 1 K.B. 195; 46 T.L.R. 643.

[25] [1931] A.C. 726.

[26] (1936) 41 Com.Cas. 350, 360, 361.

[27] [1927] A.C. 430, 438.

[28] [1945] 1 All E.R. 278, 282; affirmed C.A. [1945] 1 All E.R. 531.

[29] (1854) 15 C.B.Rep. 46, 62.

[30] (1885) 10 P.D. 103, 108–109.

Harding & Sons Ltd.,[31] and then there is *Owners of the S.S. Susan V. Luckenbach* v. *Admiralty Commissioners*,[32] the short title of which is *The Luckenbach*.

As to the scope of the word "remedies" in rule D, clearly it is wide enough to cover the respondents' cross-claim for the same amount as the claimants are claiming. If the cross-claim is still open, the claimants' claim can be defeated by it because judgment should be given for the respondents in order to avoid circuity of action. That has not been disputed. The question which is disputed at this stage of the argument is whether the word "remedies" in rule D is wide enough to cover the so-called "equitable" defence, that the casualty was caused by the claimants' own fault. Mr. Donaldson argued that the word "remedies" refers only to positive legal steps which may be taken to assert and enforce a claim, and does not include a mere defence to a claim. Using a very familiar metaphor, one can say that according to his argument a remedy is in the nature of a spear, which a man uses to attack somebody else, and is not in the nature of a shield, with which he seeks to repel somebody else's attack on him.

On this point Mr. Megaw referred to the Oxford Dictionary; the first three meanings given to the word "remedy" are: [Shorter Oxford English Dictionary (1944), vol. 2, p. 1699]: "1. A cure for a disease or other disorder of body or mind; "any medicine or treatment which alleviates pain and promotes "restoration to health. 2. A means of counteracting or removing "an outward evil of any kind; reparation, redress, relief. 3. Legal "redress," and then other meanings are given.

Reference was made to Stroud's Judicial Dictionary, 3rd ed. (1953), vol. 3, p. 2529, under the word "remedies," which cites several cases and gives extracts from statutes. I did refer to these cases but I was not able to obtain any material help from them upon the present problem.

Then there was cited, also by Mr. Donaldson, Webster's New International Dictionary (1928), vol. 2, p. 1803, which I believe was published in the United States, and the material extract which he read was: "LAW. The legal means to recover a right, "or to prevent, or obtain redress for, a wrong." Mr. Megaw also referred to the derivation of the word "remedy" from the Latin remedium and remedior and said that the word fundamentally

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[31] [1928] 2 K.B. 371, 384–385, 390–391.

[32] [1951] P. 197, 203; [1951] 1 T.L.R. 165; [1951] 1 All E.R. 753.

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means something healing or curative. He said that an antidote is a remedy and a plea to a claim is an antidote to an ill.

Mainly I am influenced by the evident objects of rule D, which are to keep the whole question of alleged fault outside the average adjustment and to leave the legal " remedies " in respect of fault unimpaired. There is no reason to suppose an intention to destroy defences while keeping alive cross-claims. The intention which may reasonably be inferred is an intention to preserve the legal position intact at the stage of enforcement. Suitable effect is given to that intention by construing the word " remedies " in rule D as wide enough to cover defences as well as cross-claims, shields as well as spears, pleas as well as counts.

Next one has to consider what is, for the purposes of a case such as this, the meaning of the word " fault " in English law. There is the case of *The Carron Park.*[33] The headnote states: " By a charterparty it was agreed that the defendants' steam " vessel should go to New Fairwater, and there load from the " agents of the plaintiffs a cargo of sugar and proceed therewith " to Greenock, the defendants not to be responsible ' for any act, " ' neglect, or default whatsoever of their servants during the " ' said voyage.' The agents commenced loading the vessel with " sugar belonging to the plaintiffs, and during the loading the " cargo was damaged by water through a valve in the engine-room " having been negligently left open by one of the engineers of the " vessel: . . . The defendants counterclaimed for a general average " contribution from the plaintiffs:—*Held*, that their right to " contribution was not affected by the negligence of their servants, for which by the terms of the exception they were not " responsible, and that they were entitled to recover." Hannen P. said[34]: " With regard to the counter-claim for general average, " I think the defendants are entitled to recover. The claim for " contribution as general average cannot be maintained where " it arises out of any negligence for which the shipowner is " responsible; but negligence for which he is not responsible is " as foreign to him as to the person who has suffered by it. The " loss would not have fallen on the shipowner, and the expenditure or sacrifice made by him is not made to avert loss from " himself alone, but from the cargo owner. This question was " considered in the case of *Strang, Steel & Co.* v. *A. Scott &* " *Co.*[35] That was a case of jettisoned cargo; Lord Watson, in " delivering judgment, says[36]: ' The fault of the master being

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[33] (1890) 15 P.D. 203.

[34] Ibid. 207.

[35] 14 App.Cas. 601.

[36] Ibid. 609.

" 'matter of admission, it seems clear upon authority that no " 'compensation can be recovered by the owners of the' (ship) " 'unless the conditions ordinarily existing between parties " 'standing in that relation have been varied by special contract " 'between them and their shippers.' Here it appears to me "that the relation of the goods owner to the shipowner has "been altered by the contract—that the shipowner shall not be "responsible for the negligence of his servants in the events "which have happened."

Then there was another case of *Milburn & Co.* v. *Jamaica Fruit Importing and Trading Co. of London.*[37] There the headnote reads: "Where a contract for carriage of goods "by sea contains an exception of negligence of the master "and crew, the shipowner is entitled to a contribution from the "owner of the goods to general average expenses, though the "necessity for the same has been occasioned by the negligence "of the master:—So *held* by A. L. Smith and Romer L.JJ., "Vaughan Williams L.J. dissenting." The first relevant passage is where A. L. Smith L.J., after a citation from the judgment of Lord Esher in *Burton & Co.* v. *English & Co.*,[38] said[39]: "But, although general average is not the creature of "contract, that does not settle the question in the present case; "for what the contract of carriage is becomes an important factor "when considering, not whether a general average claim for "contribution has arisen, but in considering, assuming that such "claim has arisen, whether it can be taken away by the cargo "owner showing that, as between him and the shipowner, the "latter, to use Lord Watson's words, has been a wrongdoer. "To create the shipowner a wrongdoer as regards the cargo owner "there must be the breach of some duty, and, if by agreement "between the two it has been agreed that it shall be no breach "of duty for the master to be guilty of negligence, in other words, "that as between the two the negligence of the master shall be "always excepted, it cannot be said that it is a breach of duty "towards the cargo owner for the master to be guilty of that "which the cargo owner and shipowner have agreed shall be no "breach of duty at all." Then he said that that raised the question whether *The Carron Park*[40] is good law, and, having made a citation from that case, said[41]: "This decision of Sir "James Hannen has been acted upon in practice in this country

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[37] [1900] 2 Q.B. 540.
[38] 12 Q.B.D. 218.
[39] [1900] 2 Q.B. 540, 546.
[40] 15 P.D. 203.
[41] [1900] 2 Q.B. 540, 547.

"ever since it was given, and we are asked now to overrule it." He states[42]: "When read it will be seen that these cases do "not deal with the question whether, where a general average "expenditure has been incurred, the right to contribute thereto "can be taken away by showing that the party incurring the "expenditure was a wrongdoer as regards the person called upon "to contribute. Whether he be such a wrongdoer must, as it "seems to me, depend upon the contract which existed between "the parties. This is not, as before stated, a case in which the "question is whether a general average claim has arisen, for that "in this case is not disputed, but the question is whether the "shipowner has been a wrongdoer to the cargo owner. The "shipowner says to the cargo owner, 'a general average loss "'has occurred to which you must contribute, and you cannot "'show that I have been guilty of negligence so as to absolve "'you from contributing thereto, for by express contract between "'us negligence is excepted.'"

Then Romer L.J. said[43]: "Between shipowners and charterers "such negligence was to be 'mutually excepted,' so that both "parties could be regarded as equally blameless in respect of it. "Let me then first consider how the case would have stood "between the parties to the charterparty if all the goods on "board the vessel during a voyage had been the property of the "charterers, and then by the master's negligence a condition "arose necessitating a sacrifice at the expense of the shipowners "for the common good, so that prima facie a claim for general "average contribution against the owners of the cargo had arisen. "In my opinion there could have been no answer to the claim. "The charterers could not have brought themselves within the "exception to general average claims which is so well known, "and was discussed by Lord Watson in the case cited[44] in the "judgments already delivered. For the charterers could not "have said as against the shipowners that the negligence of the "master was to be attributed to the shipowners, so as to place "the latter in the position of persons who had brought about "the peril necessitating the common sacrifice by their own "wrong. There would have been no ground for treating the "shipowners and the charterers as standing on a different footing "at the moment when the common sacrifice became necessary. "As between themselves they stood at that moment on a footing "of equality. Neither the goods as against the ship, nor the

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[42] [1900] 2 Q.B. 540, 547.

[43] Ibid. 554, 555.

[44] 14 App.Cas. 601.

"ship as against the goods, had any claim by reason of any "peril arising, or loss which might have resulted, from the "master's negligence; and the position of equality is the very "essence of the right to contribution. It would in my opinion, "be matter for regret if the opposite view were upheld, for the "result would be that, though, if loss ensued to the goods by "the peril, the shipowners could not be made responsible for the "loss, yet, if to avoid that peril a sacrifice is made at the expense "of the ship, there would be no right of contribution."

In *Tempus Shipping Co. Ltd.* v. *Louis Dreyfus & Co. Ltd.*,[45] which I have already mentioned, in the Court of Appeal Greer L.J. said[46]: "It seems to me that the question which "has to be asked in cases of this kind is: 'Is the danger which "'occasions the sacrifice or the expense sought to be recovered "'one for which the shipowner is responsible to the cargo owners, "'so that it can be said that he has made the sacrifice or incurred "'the expense not for the benefit of all concerned, but for his "'own benefit only?'"

In the same case in the House of Lords Lord Warrington of Clyffe said[47]: "The next question is how does the contract "between the shipowner and the cargo owner affect the right "of the former to contribution by the latter to general average "expenses. I agree with Greer L.J. that the right to contribution arises whenever the expenditure is incurred or the sacrifice "made in the interest of both the parties and not of one of "them alone. In the present case, inasmuch as the whole of "the loss of or damage to the cargo falls on the cargo owner, "the expenditure in question is incurred in the interest of both "parties, and a due proportion thereof in the shape of contribution in general average would be recoverable by the shipowner." Then Lord Atkin [referring to *Milburn & Co.* v. *Jamaica Fruit Importing and Trading Co. of London*[48]] said[49]: "The defence "argued by Mr. Carver K.C. and Mr. Scrutton was that if the "bills of lading had contained a negligence clause still the shipowner would not have been entitled to contribution, and that "the decision in *The Carron Park*[50] was wrong. The court by a "majority (A. L. Smith L.J. and Romer L.J.; Vaughan Williams "L.J. dissenting), gave judgment for the shipowner and affirmed "*The Carron Park*.[50] A. L. Smith L.J., a judge of large

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[45] [1931] 1 K.B. 195.
[46] Ibid. 211.
[47] [1931] A.C. 726, 742.
[48] [1900] 2 Q.B. 540.
[49] [1931] A.C. 726, 748.
[50] 15 P.D. 203.

"experience in these matters, said[51]: 'To create the shipowner "'a wrongdoer as regards the cargo owner there must be the "'breach of some duty, and if by agreement between the two "'it has been agreed that it shall be no breach of duty for the "'master to be guilty of negligence, in other words, that as "'between the two the negligence of the master shall be always "'excepted, it cannot be said that it is a breach of duty towards "'the cargo owner for the master to be guilty of that which the "'cargo owner and shipowner have agreed shall be no breach "'of duty at all.' Romer L.J. expressed the same reasoning, "pointing out that, with the negligence clause, at the moment "of the sacrifice shipowner and cargo owner between themselves "stood on a footing of equality."

It appears, therefore, in my opinion, from the citations which have been given, that for the relevant purpose a "fault" is a legal wrong which is actionable as between the parties at the time when the general average sacrifice or expenditure is made. In the present case there was a legal wrong, and it was actionable as between the parties at the time when the general average expenditure was made. There was, therefore, a "fault" in this case. Whatever effect the third paragraph of article III, rule 6. of the Hague Rules may have upon the rights of the parties in other ways, it did not deprive the legal wrong of its character as a "fault."

Now I have to consider what effect, if any, the third paragraph of article III, rule 6, of the Hague Rules has had upon the legal position. Has it destroyed the respondents' equitable defence, and has it destroyed their cross-claim? In my view clearly it has not destroyed the equitable defence because it brings about only a discharge of liabilities and not a barring of defences. Therefore, if I am right in my conclusion that the equitable defence is one of the "remedies" preserved by the second part of rule D of the York-Antwerp Rules, that defence is unaffected by the third paragraph of article III, rule 6, of the Hague Rules, and defeats the claimants' claim.

What effect, if any, does the third paragraph of article III, rule 6, have upon the respondents' cross-claim? This is a rather elusive problem because the cross-claim is in a sense artificial, being intended ultimately to have only the effect of repelling the claimants' claim, if any. The problem can be stated in this form. Have the claimants been discharged under the said third

[51] [1900] 2 Q.B. 540, 546.

paragraph from liability on the respondents' cross-claim for damages equal to the amount of the claimants' claim against the respondents for general average contribution? There is a gap in the wording of the said third paragraph, which reads: "In any event the carrier and the ship shall be discharged from "all liability in respect of loss or damage unless suit is brought "within one year after delivery of the goods or the date when "the goods should have been delivered." There are no express words to provide a subject-matter for the "loss or damage," and there are no express words to identify "the goods." But, in my view, there is an implied reference to the cargo owner's goods. The liability of the carrier and the ship must be a liability to the cargo owner, who is the other party to the contract of carriage, and the loss or damage for which the carrier or the ship is initially liable must be loss or damage arising out of the contract for the carriage of the cargo owner's goods, and the goods of which the date of delivery or non-delivery is significant for the cargo owner must be his goods. In my view the loss or damage referred to must be loss or damage which is related to the cargo owner's goods, and the delivery of the goods must mean the delivery of his goods. But how close is the relation required between the loss or damage and the cargo owner's goods? Can the loss or damage be confined to actual loss of or physical damage to the cargo owner's goods? That can be plausibly suggested when regard is had to the provisions of article III, rule 6, taken as a whole, but it is difficult to maintain in the face of the decision of the House of Lords in *G. H. Renton & Co. Ltd.* v. *Palmyra Trading Corporation of Panama*,[52] that the "loss or damage to or in connexion with the goods" referred to in article III, rule 6, is not confined to actual loss and physical damage, and the decision of Devlin J. in *Anglo-Saxon Petroleum Co. Ltd.* v. *Adamastos Shipping Co. Ltd.*,[53] that the "loss or damage" referred to in article IV, rules 1 and 2, is not confined to actual loss and physical damage.

It can be argued for the claimants that there is a sufficient connexion between the damage in this case, which is the respondents' liability to pay general average contribution, and the respondents' goods, because the liability arises from the fact that those goods were carried on the voyage on which the casualty occurred, and they could be held under lien for general average contribution until a general average bond was given or some equivalent arrangement was made. That is certainly arguable, but in my view the connexion is too remote. The liability to pay general average contribution is not related to the respondents' goods but to the ship's expenditure in the present case, and it might in some other case be related to the jettison of or damage to some other person's goods. The respondents' goods were duly delivered, and there was no loss or damage of or to or in connexion with them. There is this further consideration: If the cargo owner has sustained loss or damage of or to or in connexion with his goods which are or should have been delivered to him, he is in any normal case aware of the loss or damage at or about the date of delivery, and it is not unreasonable that time should run against him from that date. But if his goods have been duly and safely carried, discharged and delivered and, for some reason or in some way not connected with his goods, a general average contribution is required for ship's expenses or jettison of or damage to some other person's goods, the date for delivery of his goods has no adequate significance or relevance to the claim for general average contribution or his liability in respect of it or his cross-claim for the shipowner's fault, and in regard to those matters it is not fair or reasonable that the time should start running against him as from the date when his goods are delivered to him. At that date, and for long afterwards, he may have little or no knowledge of the ship's expenses or the other person's goods or what happened to them. The cases of *Schmidt* v. *Royal Mail S.S. Co.*[54] and *Greenshields, Cowie & Co.* v. *Stephens & Sons Ltd.*[55] help to show that matters related to general average contribution are outside the scope of provisions such as this.

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[52] [1957] A.C. 149, 166, 169, 173, 175.

[53] [1957] 2 Q.B. 333.

I therefore decide that the claimants have not been discharged under the third paragraph of article III, rule 6, from liability on the respondents' cross-claim. The cross-claim is available and can be set against the claimants' proposed claim, and to avoid circuity of action judgment would be given for the respondents.

I will merely mention two other points which were argued for the respondents: (1) That the so-called "New Jason clause," which is the second paragraph of clause 9 of the bill of lading, affects the interpretation of rule D of the York-Antwerp Rules, 1950; and (2) that the word "fault" in rule D does not cover unseaworthiness or failure to exercise due diligence to make the ship seaworthy. Having reached a decision on other grounds, I will not deal with those two points.

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[54] (1876) 45 L.J.Q.B. 646.

[55] [1908] A.C. 431, 436.

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The decision of the court upon the question of law stated in the special case is in the negative. Upon the facts found and upon the true construction of the contract, the claimants are not entitled to recover the said sum of £22 10s. 4d. or any sum from the respondents in respect of contribution to general average. The award of the arbitrator is affirmed.

Award upheld.

Solicitors: *Richards, Butler & Co.; Waltons & Co.*

J. F. L.

STRATFORD *v.* SYRETT.

[Plaint No. N. 200.]

C. A.

1957
Oct. 10, 11.

Lord Evershed M.R., Romer and Ormerod L.JJ.

Landlord and Tenant—Rent restriction—Possession application—Trust for sale—Beneficiary let into possession—No statutory delegation of trustees' powers—Beneficiary grants tenancy—Whether beneficiary a "landlord" entitled to possession for occupation—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 29*—Rent and Mortgage Interest Restrictions* (*Amendment*) *Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *First Schedule, para.* (*h*).
Estoppel—Conduct, by—Landlord and tenant.
Trust for Sale—Power of leasing.

Land having been devised to trustees upon trust for sale and to hold the proceeds of sale upon trust for the plaintiff for her life, in 1939 they let the plaintiff into possession. They did not delegate to her in writing their powers of management in the manner laid down in section 29 of the Law of Property Act, 1925. However, she purported to let the premises, being premises within the protection of the Rent Acts, to the defendant. He went into possession and paid rent to the plaintiff for 18 years. She sought to recover possession on the ground that the house was required for occupation by her daughter and her husband. The county court judge dismissed the application, holding that, while greater hardship would be caused to the plaintiff by refusing the application than to the defendant by granting it, she was not a landlord within the Rent Acts entitled to possession:—

Held, that the plaintiff in granting the tenancy to the defendant in 1939 was not acting under section 29 of the Law of Property Act, 1925, and that, apart from that section, a valid contract of tenancy had been created as between the plaintiff and the defendant, and she had succeeded in establishing a ground—that of greater

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hardship—which entitled the judge to make an order in her favour for possession.

Parker v. *Rosenberg* [1947] K.B. 371; 63 T.L.R. 53; [1947] 1 All E.R. 87 distinguished.

Semble that the doctrine of estoppel which applies between lessor and lessee may apply in a Rent Act case.

J. & F. Stone Lighting and Radio Ltd. v. *Levitt* [1947] A.C. 209; 62 T.L.R. 737; [1946] 2 All E.R. 653 considered.

APPEAL from Judge Lawson Campbell, sitting at Luton County Court.

The plaintiff, Mrs. Dorothy Stratford, sought to recover possession of 10, Markham Road, Streatley, Luton, being premises within the protection of the Rent Acts, from the defendant, George F. Syrett.

The plaintiff's aunt, who died in 1938, had by her will devised the premises to trustees on trust to sell and to hold the proceeds of sale upon trust for the plaintiff for her life. In 1939 the trustees had put the plaintiff into possession of the devised premises and authorized her to deal with the premises as she chose. When the trustees allowed the plaintiff to go into possession, they did not purport to exercise the powers of delegation conferred by section 29 of the Law of Property Act, 1925.[1] The plaintiff granted an informal tenancy of the premises to the defendant and he paid rent to her for 18 years. The plaintiff, having served notice to quit on the defendant, sought to recover possession. She claimed that she was entitled to such an order under paragraph (*h*) of the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act of 1933, since the premises were required for occupation by her married daughter and her husband. The plaintiff was very deaf and wanted to have her daughter living near her to help her with shopping.

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[1] Law of Property Act, 1925, s. 29: "(1) The powers of and incidental "to leasing . . . and management, "conferred on trustees for sale "whether by this Act or otherwise, "may, until sale of the land, be "revocably delegated from time to "time, by writing, signed by them, "to any person of full age . . . for "the time being beneficially entitled "in possession to the net rents and "profits of the land during his life "or for any less period: and in "favour of a lessee such writing "shall, unless the contrary appears, "be sufficient evidence that the person "named therein is a person to whom "the powers may be delegated, and "the production of such writing shall, "unless the contrary appears, be "sufficient evidence that the delegation has not been revoked.

"(2) Any power so delegated shall "be exercised only in the names and "on behalf of the trustees delegating "the power."

The defendant denied that the plaintiff's estate or interest in the premises was such that she had become his landlord for the purposes of paragraph (*h*) of the First Schedule to the Act of 1933.

The county court judge held that greater hardship would be caused to the plaintiff if he refused to grant an order for possession, than to the defendant if he made an order, but refused to make an order for possession, holding that he had no jurisdiction to do so, since the plaintiff was not a landlord within the provisions of the Rent Acts. He held that the case was covered by the decision in *Parker* v. *Rosenberg*,[2] and that the doctrine of estoppel did not apply to statutory tenancies.

The plaintiff appealed.

F. M. Drake for the plaintiff. It is not disputed that in 1939 the plaintiff let these premises to the defendant. She now claims possession from the defendant on the ground that she is his landlord by estoppel as between herself and himself. The judge refused to make an order for possession. He held that the doctrine of estoppel did not apply to a rent-restricted tenancy; but for so holding, he would have made an order for possession, since he held that the plaintiff had established that she would suffer the greater hardship if she could not obtain possession of the premises for her daughter. The judge considered that the decision in *Parker* v. *Rosenberg* [2] concluded the matter against the plaintiff. That case is distinguishable from the present for the following reasons: (1) There the contract of the tenant was with the trustees for sale, the owners of the properties. Here the defendant's contract was with the plaintiff; she is the landlord for the purposes of the Rent Acts, not the trustees. She is within the definition of "landlord" in section 12 (1) (*g*) of the Rent Act of 1920. The question whether that definition applies to the Rent Act of 1933 was left undecided in *Sharpe* v. *Nicholls* [3]; it is submitted, however, that it does, and that the plaintiff is the defendant's landlord for the purposes of the Rent Acts. (2) It is submitted that here there is a tenancy by estoppel as between the plaintiff and the defendant. The decision of the House of Lords in *J. & F. Stone Lighting and Radio Ltd.* v. *Levitt* [4] did not lay down any general principle that the doctrine of estoppel does not apply to premises within the Rent Acts. It merely laid down the principle that the doctrine could not confer on the court a jurisdiction which Parliament had said the court was not to have. The defendant is estopped as between himself and the plaintiff from relying on any defect in her title. The plaintiff is entitled to an order for possession. [Reference was made to *E. H. Lewis & Son Ltd.* v. *Morelli.*[5]]

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[2] [1947] K.B. 371; 63 T.L.R. 53; [1947] 1 All E.R. 87.

[3] [1945] K.B. 382; 61 T.L.R. 392; [1945] 2 All E.R. 55.

[4] [1947] A.C. 209; 62 T.L.R. 737; [1946] 2 All E.R. 653.

H. W. Sabin for the defendant. The tenancy which the plaintiff purported to grant could only have been duly granted if it had been made in the name of the trustees pursuant to the powers conferred by section 29 of the Law of Property Act, 1925. The requirements of that section were not, it seems, complied with as they should have been. There is no evidence that the trustees delegated their powers in writing to the plaintiff in manner required by subsection (1) of section 29. Nevertheless, the plaintiff must be deemed to have granted the tenancy as agent of the trustees. They are the defendant's landlords and the plaintiff is not entitled to possession. The doctrine of estoppel cannot be applied to give to the court a jurisdiction which it would not otherwise have: *Welch* v. *Nagy.*[6] It is not contended that the decision in *Parker* v. *Rosenberg*[7] governs this case.

LORD EVERSHED M.R. A somewhat curious point has arisen in this case, of which the material facts, quite briefly, are as follows: The premises with which we are concerned, known as No. 10, Markham Road, Streatley, Luton, appear to have belonged, before her death in 1938, to the plaintiff's aunt. By her will the aunt left the premises to trustees, who are not parties to these proceedings, upon trust for sale, the beneficial interest being for the plaintiff for life and subject thereto for the plaintiff's daughter absolutely.

After the aunt's death, the plaintiff was put into possession of the property; she was allowed to deal with it as she, the person entitled to the rents and profits, wished. So far as the evidence goes, the trustees were passive.

In 1939 the plaintiff let the premises to the defendant upon the terms of an ordinary weekly tenancy at a rent. That tenancy was entirely informal and was oral. The defendant proceeded to go into possession, and, under the contract that he made with the plaintiff, remained in possession from 1939 until the present time, paying the contractual rent.

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[5] (1948) 65 T.L.R. 56; [1948] 2 All E.R. 1021.

[6] [1950] 1 K.B. 455; 66 T.L.R. (Pt. 1) 278; [1949] 2 All E.R. 868.

[7] [1947] K.B. 371.

The plaintiff's daughter married, and the plaintiff decided that it would be right for her, if she could, to obtain possession of this property for the daughter and her husband and family, if any, to live in. In consequence, these proceedings were started, and the plaintiff put her case forward as one coming within paragraph (*h*) of the First Schedule to the Rent Act of 1933, that is to say, as a case of what is called "greater hardship."

Upon that matter of greater hardship no question now arises, for the judge, having gone into the questions of fact, concluded that the plaintiff had established her case; prima facie, therefore, he would have made an order for possession in the plaintiff's favour.

But then the question arose as regards the title to these premises, and the judge came to the conclusion that he was bound by authority to hold that no question of estoppel could be asserted by the landlord against the tenant, as might be applicable in the case of an ordinary lease outside the Rent Acts, and that, as a result of the decision of this court in *Parker* v. *Rosenberg*,[1] which he thought was on all fours with this case, he was bound to refuse relief to the plaintiff. In my judgment, with all respect to the judge, he fell into error in both those matters.

Parker v. *Rosenberg*[1] was a case in which the tenancy had been granted by certain trustees, who were trustees for sale, and proceedings were brought by the trustees and a beneficiary to recover possession. It was sought to show that greater hardship was established on the part of the beneficiary. The court came to the conclusion that the trustees, being the landlords, could not show or, indeed, assert a case of greater hardship, seeing that they themselves had no beneficial interest whatever in the property; and that, as regarded the beneficiary, she was not a party to the contract, and therefore not competent to assert any right against the tenant.

Having said that much, I think it is clear that so far from being on all fours with the present case, *Parker* v. *Rosenberg*[1] had no bearing upon it.

As regards the estoppel point, the judge's conclusion that the well-known doctrine of estoppel, which applies between lessor and lessee, has no application in a Rent Act case, was founded by the judge upon a sentence in the speech of Lord Thankerton in *J. & F. Stone Lighting and Radio Ltd.* v. *Levitt*.[2] There again, with all respect to the judge, neither the case nor the passage from Lord Thankerton's speech has any bearing on the question with which we are concerned. It was a case in which, as a result of proceedings earlier brought between the two parties, J. & F. Stone Ltd., the landlords, and the defendant as tenant, an order had been made that the statutory rent which the tenant ought to pay was 10s. a week, and so for a time matters continued. The tenant remained in occupation, paid 10s. a week, and the landlords accepted it. Further proceedings were then brought, saying, in effect, that since 10s. a week was less than the requisite fraction of the relevant rates, the case was outside the Rent Acts altogether. The only point at which estoppel came in was this: it was suggested that it was not competent for the landlords to assert that the tenancy was outside the Rent Acts, because of what had occurred and of the order made in the previous proceedings; it was said that they were estopped from so asserting. All that Lord Thankerton's observation amounted to was that you cannot give to the court a statutory jurisdiction by estoppel; either the statutory jurisdiction is there or it is not there, and whether it is there or not depends upon the parliamentary language. What Lord Thankerton said in the passage relied upon was this [3]: " From the above facts it appears " clear to me that, however bad in law the judgment on the " counterclaim may now be demonstrated to be, on the ground " that it was without jurisdiction in view of subsection (7) of " section 12 of the Act of 1920, the fact remains that the parties, " by their actions, were agreed that the rent payable in respect " of the tenancy at the material date was 10s. per week. Having " reached this conclusion in fact, it is idle to suggest that either " estoppel or res judicata can give the court a jurisdiction under " the Rent Restriction Acts, which the statute says it is not to " have."

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[1] [1947] K.B. 371; 63 T.L.R. 53; [1947] 1 All E.R. 87.

[2] [1947] A.C. 209; 62 T.L.R. 737; [1946] 2 All E.R. 653.

In my judgment, the facts of the present case show that that speech has no bearing on the problem with which we are concerned. Indeed, if it were necessary so to determine, I cannot, as at present advised, see any reason why the ordinary incidents, so far as they may be relevant in a particular case, of the old established relationship between lessor and lessee should not apply in Rent Act cases, including matters of estoppel, save to the extent that the statute expressly modifies or varies them. But here, in my judgment, no such question arises; the matter, on examination, resolves itself, as I think, into a short and simple point which only admits of one answer.

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[3] [1947] A.C. 209, 215.

In this case a valid contract of tenancy was made between the plaintiff on the one side and the defendant on the other; by virtue of that contract the defendant went into possession and remained in possession for 18 years or thereabouts—he was in truth the tenant of the plaintiff. The tenancy was a contractual tenancy resting upon the contract, and as such was plainly, as I think, a tenancy within the contemplation of the Rent Acts. As a result the defendant was able, when the plaintiff sought to determine the tenancy, to rely upon any provisions in the Rent Act which he could successfully invoke. He did resist the claim based on hardship, but that resistance was unsuccessful; he now seeks to turn round, so far as I understand it, and say that the plaintiff is not the landlord at all vis-à-vis himself within the Act or otherwise.

The argument which Mr. Sabin has put forward, in a gallant attempt to support the view of the judge, rests on section 29 of the Law of Property Act, 1925. By that section it is provided that trustees for sale may delegate to a tenant for life of the proceeds of sale their powers of leasing, subject to certain restrictions as set out in the section. One is that the delegation should be in writing; another is that the delegated power, if exercised, should be exercised by the tenant for life, or beneficiary, in the names of, and on behalf of, the trustees. Mr. Sabin therefore suggested that in the circumstances it must be assumed that the trustees intended to exercise the powers under section 29, and that the plaintiff, although she did not in fact exercise the power, if it was so delegated, in the names of the trustees at all, must be taken to have done so; with the result that, according to his argument, his real landlords were, or must be taken to be, the trustees.

But the plain answer to that argument is that the trustees are not his landlords; they were not parties to the contract. It might be that some person (for example, the remainderman) at some date (for example, after the death of the present plaintiff) may challenge the validity of what the plaintiff did, just as a mortgagee might be able to assert some title paramount against a tenant who had been given, as between himself and his landlord, a perfectly valid tenancy. But no question of that sort now arises, or could arise. The plaintiff is alive; she is in fact entitled to the rents and profits, although that is not really a matter with which the tenant is concerned. The vital thing is that by the contract of tenancy, which is in suit, she is the defendant's landlord. For my part I can see no possible answer to that simple proposition; being the defendant's landlord she has sought to determine the contract of tenancy, and she has succeeded in establishing a ground which entitles the judge to make an order to determine the contract and give possession, and that he has thought it reasonable to do.

In the circumstances, therefore, it seems to me that this appeal must be allowed. I think that the judge, having found as he did, should have made an order in the landlord's favour for possession, and I would so order here.

ROMER L.J. I agree, and if I add a few words of my own, it is only because we are differing from the judge.

Mr. Sabin supported the defendant's case before us on grounds which were different from those upon which the judge decided in the defendant's favour. Mr. Sabin said that section 29 of the Law of Property Act, 1925, provides that under certain conditions and subject to certain formalities trustees for sale, who, by reason of section 28 of the Act, have all the powers of a tenant for life in regard to management and so on of real estate, can delegate those powers, the powers of leasing and management, to income beneficiaries, and the income beneficiary in this case under the trust was the plaintiff. But by section 29 (2): "Any power so delegated shall be exercised only in the "names and on behalf of the trustees delegating the power." He said that section 29 was not complied with, because whether or not the trustees executed a delegation in the plaintiff's favour in writing is not known; but, even assuming they did, the plaintiff did not exercise the power of letting this property in the name of, and on behalf of, the trustees.

I think that is right, but there is no reason whatever to suppose that the plaintiff, in granting this tenancy in 1939 to the defendant, was acting under section 29 at all. The position, as the judge has found, was that the trustees authorized the plaintiff on her aunt's death in 1938 to manage this property and to let it, and it was in pursuance of that authority from the trustees, I suppose, that she granted the tenancy to the defendant which is in question, and the defendant accepted it. The action of the trustees may have been a breach of trust, but that was no concern of the defendant at all, and I cannot for my part see why, apart altogether from section 29, which does not come into it, a perfectly valid contract of tenancy was not created as between plaintiff and defendant. Section 29, in my opinion, is directed to cases where an income beneficiary or a life tenant wants to grant a long lease, which cannot normally be done, because the power to grant those leases is vested in the trustees for sale. If, for example, she had purported to grant a 21-year lease under section 29, but without seeing to it that the formalities under section 29 were complied with, and then she had died, that lease would not be binding upon the trustees for sale or upon the remainderman; but, if the formalities were so complied with, the lease would have been just as valid and binding upon the trustees and the remainderman as though it had been granted by the trustees themselves.

The position, as I see it, is that this is a perfectly valid contract entered into between the plaintiff and the defendant, and I cannot see why, as between those two persons, a valid tenancy was not created.

The judge was of the opinion that he was unable to hold that the plaintiff was entitled to commence these proceedings because of the decision of this court in *Parker* v. *Rosenberg*.[4] My Lord has dealt fully with that case, and has made it plain that, in truth, the decision in that case really has nothing whatever to do with the position in the present case; and, indeed, Mr. Sabin found himself unable to say that that case had the effect which the judge attributed to it.

On that view, therefore, I agree with the Master of the Rolls that no question of estoppel really arises, but had it arisen, I am bound to say that I can see no ground whatever why the plaintiff should not be regarded as a landlord for all purposes as between herself and the defendant by virtue of the doctrine of estoppel, including the purposes of the Rent Acts. Nothing could be clearer than that, inasmuch as the plaintiff let the defendant into possession in 1939 in pursuance of a contract for tenancy and the defendant remained in possession for 18 years, paying the rent to the plaintiff or her agent, at common law a tenancy by estoppel was created; nothing could be clearer than that, and I can see no reason why the landlord under such a tenancy is not a landlord for the purposes of the Rent Acts. There is no definition of " landlord " in any of the Acts which excludes such an idea, and were it necessary to decide it, my strong feeling at the moment is that I should have held that the plaintiff was a landlord for the purposes of the Act if she were driven, as in my opinion she is not, to rely on a tenancy by estoppel.

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[4] [1947] K.B. 371.

For those reasons I agree that this appeal should be allowed.

Ormerod L.J. I agree. Mr. Sabin, in his argument, has relied very strongly on section 29 of the Law of Property Act, 1925. He has argued that if the trustees wish to allow the tenant for life to exercise any of the powers which they have of letting and so on, it should be done in accordance with the provisions of section 29. He relied particularly on the effect of section 29 (2), which says that any power so delegated should be exercised only in the names of, and on behalf of, the trustees delegating the power.

I think Mr. Sabin's argument was really this, that, as that is the procedure which ought to have been followed, it must be taken that it was followed. That, of course, is far from the truth. There is no evidence at all that delegation of powers under section 29 was ever considered by the trustees or anybody else. The judge has found that the plaintiff had been allowed by the trustees to deal with the premises, and was entitled to the rents and profits, and to live in the premises or let them.

That appears to be a clear finding that the plaintiff had been let into possession of this property by the trustees, and whether they had power to do that, or not, is not a matter as between the plaintiff and the defendant.

But, the plaintiff having been let into possession, then the judge goes on to say that the trustees had allowed her to let, and in fact she did let, and thereby acted as the defendant's landlord.

In view of those clear findings of fact, it appears to me that there was a contractual arrangement between the plaintiff and the defendant. There was a contract creating a relationship of landlord and tenant, and it seems idle at this late stage, after the tenant has been in possession for some 18 years, and particularly has paid rent to the plaintiff, that he should be able to come and say that in fact he was not the tenant of the plaintiff at all, because she could never have been the landlord of the premises. I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Beachcroft & Co. for Neve, Son & Co., Luton; Turner & Evans for John Q. Clayton & Co., Luton.*

B. A. B.

BROWN *v.* DAVIES.

[Plaint No. N. 264.]

C. A.

1957
Oct. 23, 24.

Lord Evershed M.R., Romer and Ormerod L.JJ.

Landlord and Tenant—Repairs—Covenant—Lessee's covenants to keep in good repair except " damage resulting from reasonable wear and " tear "—" Upon notice " to repair—Extent of lessee's obligation.

Landlord and Tenant — Rent restriction — Possession application — Breach of covenant—Breach made good—Lessee's covenants to keep in good repair—Obligation " has been broken "—Meaning—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3, *Sch. I.*

A lease granted in 1938 of premises subject to the Rent Acts contained covenants by the tenant (*c*) " To use . . . the premises " in a fair and tenantable manner and keep the interior clean and " in good repair and condition and decorated except as to dilapida- " tions or damage resulting from reasonable wear and tear, acci- " dental fire . . ."; (*e*) to manage the garden " in a good and " husbandlike manner "; (*i*) upon notice by the landlord " to " carry out any interior repairs and decorations necessary to put " the premises in as good a state of repair and condition as the " same are now in." The tenant failed to do any decorative repairs to the house or to cultivate the garden. The landlord served notice to quit and claimed possession under section 3 and the First Schedule, paragraph (*a*), of the Rent Act of 1933 [1] on the ground that an obligation of the tenancy " has been broken or not " performed." Before the hearing the tenant had done some decorative repairs to the premises. He had done nothing to improve the condition of the garden. The judge held that the tenant was at the date of the hearing in breach of covenant both as to the house and as to the garden and he made an order for possession. The tenant contended that the effect of the exception in sub-clause (*c*) of " reasonable wear and tear " rendered that covenant ineffective and, the landlord not having served a notice under sub-clause (*i*) of the tenant's covenants, the tenant was not in breach of his repairing covenants:—

Held, that in order to find the scope and effect of a qualified covenant to repair it was necessary to look at the covenant as a whole, and an exception of fair wear and tear did not mean that the tenant need do nothing active in pursuance of his obligation to repair, and that the court had jurisdiction to make the order for possession.

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[1] Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1): " No order or judgment for " the recovery of possession of any " dwelling-house to which the princi- " pal Acts apply . . . shall be made " or given unless the court considers " it reasonable to make such an order " . . . and . . . (*a*) the court has " power so to do under the provisions " set out in the First Schedule to " this Act. . . ."

Sch. I: " A court shall, for the " purposes of section 3 of this Act, " have power to make . . . an order " . . . for the recovery of possession " . . . (where the court considers it " reasonable so to do) if—(*a*) any rent " lawfully due from the tenant has " not been paid, or any other obliga- " tion of the tenancy . . . has been " broken or not performed."

Observations of Tindal C.J. in *Gutteridge* v. *Munyard* (1834) 1 Moo. & R. 334 applied.

Taylor v. *Webb* [1937] 2 K.B. 283; 53 T.L.R. 377; [1937] 1 All E.R. 590 distinguished.

Per curiam. The court has jurisdiction under the First Schedule, paragraph (*a*), of the Rent Act of 1933 to make an order for possession, provided that it is established that at some time previous to the hearing there has been a breach of an obligation imposed on the tenant under the tenancy; if that is established, the court has jurisdiction and it then becomes a matter of discretion as to the reasonableness of making an order for possession.

APPEAL from Judge David Eifion Evans Q.C. sitting at Shrewsbury County Court.

By a tenancy agreement dated October 1, 1938, the landlord, Mrs. Sarah Anne Brown, let to the tenant, Thomas Roy Davies, a bungalow known as "Berwyn" at Myddle, Salop, at an annual rent of £28. The tenant by clause 4 of the agreement undertook "(*c*) To use and occupy the said premises in a fair "and tenantable manner and keep the interior clean and in "good repair and condition and decorated except as to dilapidations or damage resulting from reasonable wear and tear "accidental fire or the act of God . . . (*e*) To keep manage "and cultivate the said garden in a good and husbandlike manner "and free from weeds and so deliver up the same at the end or "sooner determination of the tenancy. . . . (*i*) To permit the "landlord or her agents and others with the landlord's authority "and by appointment with the tenant to enter upon and view "the condition of the said premises and upon notice given by the "landlord or her agents to carry out any interior repairs and "decorations necessary to put the premises in as good a state of "repair and condition as the same are now in."

The landlord determined the tenancy by notice to quit in June, 1952. The tenant continued in occupation as a statutory tenant protected by the Rent Acts. The tenant had failed to do any decorative repairs to the bungalow for some years and he had entirely neglected to do anything to the garden, which had become a jungle. The landlord claimed possession on the ground of the tenant's failure to observe and perform the covenants contained in sub-clauses (*c*) and (*e*) of clause 4 of the tenancy agreement. After the service of the particulars of claim and before the hearing the tenant did a certain amount of decorative repairs to the bungalow. He did, however, nothing to the garden and he was admittedly in breach of his covenants to manage the garden "in a good and husbandlike manner."

The county court judge made an order for possession.

The tenant appealed.

Douglas Draycott for the tenant. The judge did not exercise his discretion on a correct basis when he made an order for possession, because he took into account an alleged breach of the tenant's covenant contained in sub-clause (*c*) of clause 4 of the tenancy agreement when, on the true construction of that covenant, there had been, in fact, no breach of it. It is not disputed that the tenant was in breach of the covenant in sub-clause (*e*) in regard to the garden. But the judge did not exercise his discretion solely having regard to the breach of that covenant. He took into account also the alleged breach of the repairing covenant in sub-clause (*c*). The case should be sent back for a fresh trial. Since he took into account matters which he ought not to have taken into account, he cannot have rightly exercised his discretion. It is submitted that the tenant was not in breach of his covenant in sub-clause (*c*) at the date of the hearing. On the true construction of sub-clause (*c*) the tenant is not liable to make good wear and tear and deterioration due to the normal friction of the elements. It appears from the decision in *Taylor* v. *Webb* [2] that the exception of "fair wear and tear" results in a tenant being, in effect, under no liability for repairs in the case of a covenant of this kind. [Reference was made to Walford's Hints on Draft Leases, 3rd ed., p. 42.]

The tenant was under no obligation to do any repairs until the landlord had served a notice under sub-clause (*i*) calling on him to do them. No such notice was ever served. No positive act in breach of the covenant in sub-clause (*c*) is alleged. The tenant is only charged with acts of omission. He neglected the garden, but that of itself would not justify the judge in making an order for possession. The judge in reaching his conclusion took into account a lot of irrelevant evidence. Much of the landlord's evidence went to show the state of the repairs before the hearing. Most of the matters in respect of which it was alleged that the tenant was in default had been remedied before the hearing and were not relevant for consideration at the hearing. It was the then state of the premises which the judge should have considered.

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[2] [1937] 2 K.B. 283; 53 T.L.R. 377; [1937] 1 All E.R. 590.

G. T. Meredith for the landlord. This case is distinguishable from *Taylor* v. *Webb.*[2] Here a positive obligation to repair is imposed by sub-clause (*c*) on the tenant, and the question is how far that positive obligation is cut down by the exception of fair wear and tear. If the decision in *Taylor* v. *Webb*[2] is taken literally, the obligation imposed by sub-clause (*c*) is reduced to practically nothing and nonsense is made of it. That decision was given in respect of a somewhat exceptional covenant. It has not overruled the observations of Tindal C.J. in *Gutteridge* v. *Munyard*,[3] where he said that such an exception did not relieve a tenant from keeping premises as nearly as possible in the state in which they were at the time of the demise. That case was not cited to the Court of Appeal when *Taylor* v. *Webb*[4] was decided. The decision in *Haskell* v. *Marlow*[5] shows that an exception of fair wear and tear does not relieve a tenant from his obligations under a repairing covenant of this kind. The onus of proving that the lack of repair fell within the exception of fair wear and tear lies on the tenant: *Taylor* v. *Webb.*[6] No evidence was given by the tenant showing that the case fell within the exception. The judge's decision should be upheld. He largely exercised his discretion having regard to the tenant's failure to cultivate the garden. If there had been no breach of the covenant in sub-clause (*c*), he would have exercised his discretion in the same way. [Reference was made to Woodfall on Landlord and Tenant, 25th ed., pp. 765, 766.]

Douglas Draycott in reply. The exception of fair wear and tear negatives the whole operation of the covenant in sub-clause (*c*). It qualifies the whole sub-clause, which only imposes an obligation on the tenant in the case of wilful damage. This covenant is indistinguishable from that considered in *Taylor* v. *Webb*,[6] and that decision should be followed. If it is held that the tenant is liable to repair under sub-clause (*c*), sub-clause (*i*) imposes a second and similar obligation. The tenant should not be liable to a double obligation. This lease should be read as a whole. The landlord's remedy for failure to repair is by putting the machinery in sub-clause (*i*) in operation. Sub-clause (*c*) covers accidents not covered by sub-clause (*i*). The absence of a general repairing covenant does not detract from the authority of *Taylor* v. *Webb.*[6] Since that decision, the observations of Tindal C.J. in *Gutteridge* v. *Munyard*[7] must be regarded as overruled.

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[2] [1937] 2 K.B. 283.
[3] (1834) 1 Moo. & R. 334.
[4] [1937] 2 K.B. 283.
[5] [1928] 2 K.B. 45; 44 T.L.R. 171.
[6] [1937] 2 K.B. 283.
[7] 1 Moo. & R. 334.

For the purposes of the exercise of the discretion to order possession conferred on the judge by the First Schedule, paragraph (*a*), the relevant time for considering whether there has been a breach of any obligation of the tenancy is the date of the hearing, and breaches before that date, but which have been remedied before the hearing, are not material for consideration.

Lord Evershed M.R. This is an appeal from an order made for possession of a bungalow with a garden attached to it known as "Berwyn" in Myddle, Shropshire. The appeal has raised some points of interest and difficulty and we are much indebted to Mr. Draycott for the arguments he has put forward for the tenant.

To make clear the questions I must lay a foundation of fact by reference to the history. The landlord, Mrs. Brown, entered into a long and indeed elaborate form of tenancy with the tenant as long ago as October 1, 1938, and one of the questions which has been mainly argued here concerns the effect of the covenants by the tenant in that agreement.

There has been no change either in the proprietorship of the reversion or in the occupancy, save only this—and it is a point to which the judge drew attention and in support of which he expressed, as one cannot help doing, some sympathy for the tenant—that somewhere about 1951 or 1952 the tenant unfortunately had serious domestic trouble and his wife departed from the premises, leaving him alone. He works as a managing clerk in a solicitor's office some little way away and so has to leave the house, I take it, early in the day and return perhaps late in the evening. It is not unnatural that a man suddenly left alone should not be very adept at looking after a house and garden, matters which one might expect would more naturally have been within the province of his wife. Be that as it may, in the month of June, 1952, the landlord served upon the tenant notice to quit, and there is no question that it was effective. Thereafter the tenant has remained in occupation as a statutory tenant, since (again it is not a matter of dispute) the premises were within the ambit of the rent restriction legislation.

So matters went on for a long time, until eventually the present proceedings were started somewhat suddenly. There had been correspondence last year in which the landlord intimated that she wished to inspect the premises with a view to calling upon the tenant to execute some repairs. She did not in fact follow that up, but instead initiated the present proceedings. She based her

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claim upon the grounds which were set out in her particulars of claim as follows: that the tenant had committed breaches of the obligations which still bound him as a statutory tenant, derived as they were from the contract of tenancy, and the breaches complained of were of three kinds—first, failure to repair and decorate, second, failure to keep, manage and cultivate the garden, and third, doing acts which were annoying to the landlord or the neighbours. The last matter dropped completely out of the case and I say no more about it. But if either or both of the two first complaints could be established, then the jurisdiction would arise for the county court judge to make an order for possession and thereafter the question would be whether the judge in his discretion would think it reasonable so to do.

The terms of section 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, are well known. The power to make an order arises by virtue of the schedule, inter alia, if any rent has not been paid or if any other obligation of the tenancy "has been broken or not performed." It was suggested here and also before the judge that the material time at which you must see whether there was a breach of covenant was at the hearing. In the events of this case, I do not think it decisive whether that view be right or wrong, but I am not satisfied that it is correct. The language is: "any . . . obligation . . . has been "broken." The ordinary sense of that phrase must be that the judge has to decide at the hearing whether there "has "been" a breach of the covenant. The judge confined himself to the state of affairs as it was proved before him at the hearing, and he found, as a fact, that at that date the tenant was in breach of both the covenant as to repair of the house and also that in regard to the garden. On that view of the matter, it is not now in doubt that the tenant was, at the date of the hearing, in breach of covenant—namely, his covenant as regards the garden. But, as I have already indicated, I do not accept the view that, upon the sense of the relevant language in the schedule, the judge was in truth so confined.

I shall have presently to examine more fully the evidence about the house, but as regards the garden it is not in issue that the tenant not only had committed breaches of his obligation, but that he was still at the hearing in breach. As the judge pointed out, the tenant, whatever his qualities in his profession may be, was no gardener and apparently gardening was not a matter in which he took the smallest interest. In the result, to use the word which was used in the evidence, the exterior of the place, the garden surrounding the property, had become a jungle. That being so, it follows that the jurisdiction for the judge to make the order arose, whether or not he rightly concluded that there had been, or was at the date of the hearing still subsisting, a breach of the repairing covenant.

The case, therefore, has narrowed on any view of it to the question whether the judge rightly exercised his discretion in making the order. The main attack upon the order has been to this effect: that the judge took into account, as relevant for the exercise of his discretion, breaches past, as well as present, of the covenant as to repair; that he was in error as a matter of law, having regard to the construction of the covenant, in so doing; and, therefore, that the allegation that it was reasonable to make an order cannot stand. Mr. Draycott asked in opening the case that we should say that, in the circumstances, the only result must be to set aside the order for possession. Again, I am far from satisfied that, given the premise, that would be the right conclusion. If the judge had misdirected himself, I do not think it follows that we should thereupon set aside the order for possession. It might become necessary to send the case back, but, in the circumstances stated, it might also be that this court could then determine, on a true apprehension of the matters to be taken into account, what order should be made. Again, however, in the end of all, those considerations do not arise because, in my judgment, for reasons which I must now attempt to state and justify, there was here no misdirection by the judge.

I need not refer to what I will call the garden covenant, because no question turns upon that. Clause 4 of the tenancy agreement, comprising the tenant's covenants, contains many sub-clauses, of which (*c*) is: "To use and occupy the said "premises in a fair and tenantable manner and keep the interior "clean and in good repair and condition and decorated except "as to dilapidations or damage resulting from reasonable wear "and tear accidental fire." Sub-clause (*i*) reads: "To permit "the landlord or her agents and others with the landlord's "authority and by appointment with the tenant to enter upon "and view the condition of the said premises and upon notice "given by the landlord or her agents to carry out any interior "repairs and decorations necessary to put the premises in as "good a state of repair and condition as the same are now in."

It is obvious, on a reading of those two sub-clauses, that the latter, on the face of it, is or may be of much stricter incidence upon the tenant than the former; for, on the face of it, if the landlord were to view the premises and then to give notice to do decorations in order to bring the premises into the condition that they were in on October 1, 1938, the tenant could not evade his obligation by saying: "You cannot require me to make good "that lack of repair or decoration for it can be shown to be "exclusively due to reasonable wear and tear."

I agree with Mr. Draycott that the duty of the court must be to construe, so far as possible, these sub-clauses together so as to arrive at a coherent whole. Mr. Draycott's solution of the apparent conflict is to say that the real burden imposed upon the tenant is to be found in sub-clause (*i*) and that the landlord should pursue his remedy in accordance with the provisions of that sub-clause; that sub-clause (*c*), if not rendered wholly ineffectual, is at best a very much slighter and relatively insignificant provision. I am not satisfied that the result of putting the two together in that way is to reduce the significance of sub-clause (*c*) almost to nothing. I think it may well be inescapable that, whoever drafted this agreement, succeeded in the end in producing some repugnance in the provisions of the two sub-clauses. I think one must pay due regard to sub-clause (*c*) according to its own language, and the only effect of having sub-clause (*i*) in the back of one's mind would rather be, contrary to the submission of Mr. Draycott, to make one disinclined to produce the somewhat absurd result that, notwithstanding sub-clause (*i*), the first obligation as to repair and decoration is of practically negligible effect.

In support of the argument for reducing to minimal significance sub-clause (*c*), Mr. Draycott has relied strongly upon a decision of this court in *Taylor* v. *Webb.*[1] The report is long and I shall not follow all through the three judgments, nor elaborate greatly the facts. I observe, however, that the facts were exceptional. It may suffice if I borrow the language of Scott L.J. from his judgment where he says[2]: ". . . our "task"—that is of construction of the covenant—"is not quite "the ordinary one, as we have to construe the words removed "from their normal context of a tenant's covenant and trans-"ported into the text of a landlord's covenant." Scott L.J. was referring to this circumstance, that the landlord, in the case then before the court, was himself a lessee under a head-lease and under that head-lease he had imposed upon him as lessee an obligation to repair and decorate the premises, to "keep the

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[1] [1937] 2 K.B. 283; 53 T.L.R. 377; [1937] 1 All E.R. 590.

[2] [1937] 2 K.B. 283, 301.

"premises hereby demised, and the fixtures, painting, papering "and decorations thereof in good and tenantable repair," and then followed the exception familiar enough to persons who practise in this class of work, "destruction or damage by fire "and fair wear and tear excepted." The lessee then, by the under-lease being transmuted into the situation of a landlord, assumed in the under-lease a more limited obligation as to repair; for it was only to keep the outside walls and roofs properly repaired. But there was added the following referential language: "as and so far only as is required to be done by them under the "head-lease."

One of the first problems the court had to decide was what was the effect of the reference to the lease, and the court held that it imported into the obligation to keep the outside walls and roof properly repaired the exception "fair wear and tear "excepted." In the case, therefore, before the Court of Appeal, there was imposed upon the landlord (who was also the tenant under the head-lease) a repairing covenant, which was limited to the outside walls and roof.

At the end of his judgment Slesser L.J., who delivered the first judgment of the court, said [3]: "It will be observed that in "this case, unlike the case of *Haskell*,[4] there was no general "obligation to keep the dwelling-house in good repair and con"dition but only the walls and roofs, and for the reasons which "I have stated I have come to the conclusion in this case, on "the facts, that the landlord had no obligations whatever with "regard to reparation. . . ."

The matter was put by Scott L.J. in this fashion [5]: "The "learned judge in effect found, and in my view rightly found, "that the whole of the disrepair was due to the elements, coupled "with the absence of any steps by anybody to prevent further "progress of the decay: There was no suggestion of any "'unfair' user by anybody, either tenant or landlord."

Finally, Farwell J., the third member of the court, said [6]: "Under that covenant the lessor is prima facie liable for the "serious state of disrepair into which admittedly the walls and "roof have fallen, unless he can show (and the onus is on him) "that that condition is due wholly to fair wear and tear. The "meaning of the exception in such a case as this is, in my "judgment, that the lessor is under no liability for disrepair "due solely to such ordinary natural causes as may fairly be

[3] [1937] 2 K.B. 283, 299.

[4] [1928] 2 K.B. 45; 44 T.L.R. 171.

[5] [1937] 2 K.B. 283, 304.

[6] Ibid. 307.

"said to have been in the contemplation of the parties, for "example, wind and weather, assuming no abnormal use of the "property by him."

The damage complained of in *Taylor* v. *Webb* [7] was found to have been the direct and sole result of the operation of the elements upon a sky-light in the roof and so the conclusion went.

Mr. Draycott has sought to say that that case lays down a broad rule that where you find an exception, as you find in this paragraph, "except as to dilapidation or damage resulting from "reasonable wear and tear," the effect is, for practical purposes, to negative all the preceding obligations, unless it can be shown that the state of repair is due to some active or wilful damage done by the tenant as a tenant. If that were its effect, *Taylor* v. *Webb* [7] would have operated to set at nought what had been laid down as long ago as 1834 by Tindal C.J. in *Gutteridge* v. *Munyard*.[8] I quote Woodfall on Landlord and Tenant, 25th ed., p. 765, to which Mr. Meredith drew our attention. Tindal C.J. stated the effect of a repairing covenant containing an exception of reasonable use and wear in these words: "What the natural "operation of time flowing on effects, and all that the elements "bring about in diminishing the value, constitute a loss, which, "so far as it results from time and nature, falls upon the land-"lord. But the tenant is to take care that the premises do not "suffer more than the operation of time and nature would "effect; he is bound by seasonable applications of labour to keep "the house as nearly as possible in the same condition as when "it was demised."

I cannot conclude that this court in *Taylor* v. *Webb* [9] intended to lay down a broad proposition inconsistent with the long-established statement of Tindal C.J.; all the more so perhaps since the case in which Tindal C.J. made that statement, *Gutteridge* v. *Munyard*,[10] was not in fact referred to at all.

But, in any case, the question of the construction of any covenant must depend upon the words of the particular covenant sought to be construed. I have already referred to the somewhat unusual terms of the covenant in *Taylor* v. *Webb*,[11] a covenant which Scott L.J. indeed described as being a topsy-turvy covenant, a hybrid. Here the obligation of the tenant is far more extensive on the face of it than was the obligation of the landlord in *Taylor* v. *Webb*.[11] Observe that it opens with the words: "To use and occupy the said premises in a fair and "tenantable manner and keep the interior clean and in good "repair and condition and decorated," and the exception is limited to "dilapidation or damage resulting from reasonable "wear and tear."

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[7] [1937] 2 K.B. 283.

[8] (1834) 1 Moo. & R. 334.

[9] [1937] 2 K.B. 283.

[10] 1 Moo. & R. 334.

[11] [1937] 2 K.B. 283.

I do not think it necessary or right that I should attempt to give an exposition of the exact scope of this provision. I am satisfied, to put it no higher, that if proof is given that the tenant is not keeping the premises in a fair and tenantable manner and not keeping the interior clean and well repaired and decorated, then, at the very least, the tenant must establish that the matters complained of ought to be attributed to dilapidation or damage resulting from reasonable wear and tear and to nothing else. It is to my mind quite plain that the tenant in this case, having such an onus upon him (as Mr. Draycott admits that he has), failed so to satisfy the judge.

I now must make some reference to the evidence. The note is a little brief, but there were called in addition to the landlord's husband two experts who described the state of repair as they had found it at the date of an inspection somewhat before the trial. Mr. Evans, who was a partner in a firm of chartered surveyors, said that at least five years had passed since any decoration had been carried out; the entrance hall was not in good condition, with plaster cracks in the ceiling; the plaster in the kitchen was badly cracked at the side of the grate, and the paintwork was fair; the back kitchen showed flaking on the walls; the bathroom walls were dirty and the ceiling flaking; the bedroom showed slight signs of damp, with tarnished decoration; in the sitting-room the paper was peeling and the ceiling was cracked in three or four places. He described the place as being "occupied and "not lived in," which, no doubt, is attributable, in fairness to the tenant, to the unhappy domestic situation in which he found himself.

On the basis of the evidence given—and I do not, of course, forget that according to the evidence put forward on the tenant's side his sins were of pure omission and nothing else; he had just done nothing—the judge's conclusion on fact was as follows: "With regard to the interior decoration, it is also significant I "think that he [the tenant] even went to the extent of having "these premises wired for electricity without asking leave of the "[landlord] at all, treating her as if she didn't exist except, "of course, that he paid his rent; he treated the house as if "it were his own, and there was neglect due to the unhappy "circumstances, in that he lived there alone." The judge concluded: "I think it would be reasonable for her to want it "for someone in her family to live in, and reasonable to desire "possession of a bungalow next door to her which would be "occupied by someone who will keep it in good reasonable order "and not have this continued eyesore in front of her every "time she goes out of her own front gate." Earlier he had dealt with the point on internal decoration, and again the judge had drawn attention to the passage in the evidence I have mentioned that the place gave the impression of being occupied rather than lived in. He said that he could not at that late date accept an undertaking by the tenant to keep it in proper repair.

I do not propose to go into further detail. It is quite plain that the judge took the view that, over a period of years, this tenant had not in fact used and occupied the premises in a fair and tenantable manner and had not kept the interior clean and decorated. The judge was not satisfied that all that could be complained of were dilapidations exclusively resulting from reasonable wear and tear. In my judgment there was ample evidence for him so to hold.

It is quite true that, no doubt stirred into a sense of urgency by the pending trial, the tenant had had a lot of work done. I am not sure that the judge thought that it had been very well done. The tenant had called upon some amateur to come and do a little decoration in his spare time. But be that as it may, at the date of the trial the main complaint centred on one room, namely, the bedroom. But it is not necessary in my judgment to spend much time upon that fact. The judge was of opinion—and I have already indicated that I am not satisfied that he was right—that he was not entitled for the purposes of considering whether there had been a breach of covenant to look further back than the date of the hearing. For reasons already given, I do not think it matters whether there was, or indeed ever had been, a breach of this covenant in truth, since the jurisdiction was conferred by the breach of the covenant as regards the garden. But he was plainly entitled, in my judgment, on the matter of reasonableness to consider, as he did, the extent to which the tenant had performed his obligations not only immediately before the trial but for some long period before the trial. He concluded beyond doubt, and in my judgment was well entitled so to do, that the tenant had failed in the respects I have stated to perform the obligations which lay upon him under sub-clause (c) and failed, putting it the other way round, to prove an excuse founded upon the exception of fair wear and tear.

The judge therefore reached his conclusion that it was reasonable to make an order, because it was reasonable to require and expect that this bungalow and this garden would be in the occupation of somebody who would be a proper tenant of it and keep the place clean and properly decorated, and would look after the garden: to use again the words which the judge used, not have it a continuing eyesore every time you looked at it. I should add that the judge made it quite clear, notwithstanding the actual form of words he used (which might be perhaps misinterpreted) that he appreciated his duty was to decide whether it was reasonable to make the order and not merely whether it was reasonable for the plaintiff to ask him to make the order. But no point has been made upon that by Mr. Draycott.

In all the circumstances, therefore, I have reached the conclusion, first, that there was clear jurisdiction under section 3 and the schedule, because a clear breach was proved and, indeed, is conceded; secondly, that there was no misdirection upon any material matter which entitles this court to interfere with the judge's conclusion on the matter of discretion, that, in all the circumstances, it was reasonable to make the order. I would like to say again that the judge expressed some sympathy for the tenant. He has been there a long time and he has had a domestic calamity of the first magnitude, from which, no doubt, the present situation is derived. But though I sympathize with him for these reasons, it seems to me that we cannot disturb the order to which the landlord in the case was held to be justly entitled, and I would dismiss the appeal.

Romer L.J. I quite agree. There are only two points of any general importance that have emerged in the discussion of the case before us, and I will confine the little that I have to say to those two matters.

It was submitted by Mr. Draycott that where you find a covenant to repair and decorate, but it is qualified by excepting dilapidation or damage resulting from reasonable wear and tear, the result is that, in fact, the covenantor need do nothing active in the pursuance of his obligation; in other words, provided he just sits back and allows the elements to have such effect on the premises as naturally occurs, then it cannot be said of him that he is in breach of his covenant. Mr. Draycott says

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that is the result of the decision of this court in *Taylor* v. *Webb*.[12] In my view that is not the result of the decision in *Taylor* v. *Webb*.[12] As the Master of the Rolls has pointed out, that case was a very exceptional one, and the covenant was in a very unusual form, and, although it is true that the result which Mr. Draycott has contended for in this case was that at which the court in *Taylor* v. *Webb*[12] arrived, I am quite clear that the decision had nothing like the general effect for which Mr. Draycott has contended.

It seems to me that the law as laid down by Tindal C.J. in *Gutteridge* v. *Munyard*[13] is still the general law and was not intended to be overruled by this court in *Taylor* v. *Webb*.[14] Nor, indeed, was the statement of the law by Tindal C.J. brought to the attention of the court in that case. The truth is that, in order to find out the scope and effect of a qualified covenant to repair, you have got to look at the document as a whole, and it appears to me to be going far beyond anything that was said by any of the judges in *Taylor* v. *Webb*[14] to say that you merely have to find an exception for reasonable wear and tear to reduce the scope of the covenant to practically nothing at all.

In the present case, if one gave that negative effect to clause 4 (*c*) of the agreement, one would come in almost direct collision with the covenant under clause 4 (*i*) under which, at any time, the tenant is under an obligation, if so required by the landlord, "to carry out any interior repairs and decorations necessary to "put the premises in as good a state of repair and condition as "the same are now in." One must, so far as possible, effect a reconciliation between clauses 4 (*c*) and 4 (*i*), and no such reconciliation is achieved by depriving clause 4 (*c*), as Mr. Draycott's argument would have the effect of depriving it, of practically any effect at all.

Therefore, as I say, I think that *Taylor* v. *Webb*[14] must be regarded as a case (as indeed it was) dealing with a covenant in a very special form and with special circumstances, and that it does not form the foundation for a general statement of the law, such as Mr. Draycott has laid before this court.

The second point was one that Mr. Draycott at first submitted but after some discussion was not disposed to press, but I think as it was mentioned it might be as well to deal with it. He said that the court has no power under section 3 of the Rent Act of 1933 and the First Schedule to make an order for possession on the ground that an obligation of the tenancy has been broken or not performed, unless it is shown that the tenant is in breach at the date of the hearing—not, it is to be observed, at the date of the application, but the date when the application comes before the court. That point was put to the judge in the court below and for a time it was put to us, but I am quite satisfied that the point is not a good one.

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[12] [1937] 2 K.B. 283.

[13] 1 Moo. & R. 334.

[14] [1937] 2 K.B. 283.

So far as relevant, section 3 of the Act of 1933 says: "No "order or judgment for the recovery of possession of any dwelling-"house to which the principal Acts apply or for the ejectment of "a tenant therefrom shall be made or given unless the court "considers it reasonable to make such an order or give such a "judgment, and either—(*a*) the court has power so to do under "the provisions set out in the First Schedule to this Act." One turns to the First Schedule to the Act and the provision which is relevant to the present case is: "A court shall, for the purposes of "section 3 of this Act, have power to make or give an order or "judgment for the recovery of possession of any dwelling-house "to which the principal Acts apply or for the ejectment of a "tenant therefrom without proof of suitable alternative accom-"modation (where the court considers it reasonable so to do) if—"(*a*) any rent lawfully due from the tenant has not been paid, "or any other obligation of the tenancy (whether under the "contract of tenancy or under the principal Acts), so far as the "obligation is consistent with the provisions of the principal Acts, "has been broken or not performed."

The position of the rent is different, of course, from that of the obligation to perform the covenants, because with regard to rent it says "if any rent lawfully due from the tenant has not "been paid," and it may well be that if the tenant can show he has paid the rent when the matter comes on for hearing then he is outside that particular provision. But when it is said that the court has no jurisdiction to deal with a breach of covenant to repair, unless the tenant is in breach of it at the hearing, it appears to me that that is in direct conflict with the actual language of the section, which is "if any obligation of the tenancy "has been broken or not performed." It seems to me that the court has jurisdiction to make an order for possession under that provision, provided it is established that there has been at some time previously a breach of an obligation imposed on the tenant under the tenancy. Provided that is established the court has jurisdiction and it then becomes a matter of discretion as to the reasonableness of making the order.

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That that is the proper view of the matter is, I think, confirmed by the provisions of sub-paragraph (*b*) in the First Schedule of the Act, which deal with the case where the tenant has "been guilty of conduct which is a nuisance or annoyance to "adjoining occupiers, or has been convicted of using the premises "or allowing the premises to be used for an immoral or illegal "purpose," showing quite plainly, as I think, that if, at any time prior to the case coming on, the tenant has been guilty of nuisance or annoyance, or has been convicted, then a foundation is laid for the exercise of the jurisdiction. I thought it would be just as well to mention that, as it was raised. As I say, Mr. Draycott did not persist in it, and in my view rightly.

For the rest I have nothing to add to what the Master of the Rolls has said.

ORMEROD L.J. I agree and have nothing to add.

Appeal dismissed.

Solicitors: *Gibson & Weldon for Henry Lee, Bygott & Eccleston, Wem; Edwin Coe & Calder Woods for Shay & Lingford Hughes, Shrewsbury.*

B. A. B.

C. C. A.

1957
July 23;
Oct. 21;
Nov. 1.

Lord Goddard C.J., Donovan and Havers JJ.

REGINA v. HEAD.

Criminal Law—Mental deficiency—Carnal knowledge of mentally defective girl—Defence—Whether woman lawfully detained in institution—Whether prosecution must prove lawful detention at time of offence—Mental Deficiency Act, 1913 (3 *&* 4 *Geo.* 5, *c.* 28), *ss.* 1, 9, 56 (1) (*a*).

Mental Deficiency—Detention order—Validity.

The appellant was convicted on an indictment containing two counts, each charging him with having carnal knowledge of a mental defective contrary to section 56 (1) (*a*) of the Mental Deficiency Act, 1913.[1] At the time the offences were alleged to have been

[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

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[1] Mental Deficiency Act, 1913, s. 1: "(1) The following classes of "persons who are mentally defective "shall be deemed to be defectives "within the meaning of this Act:— ". . . (*d*) Moral defectives, that is to "say, persons in whose case there "exists mental defectiveness coupled "with strongly vicious or criminal "propensities and who require care, "supervision and control for the "protection of others."

S. 9 (as at July, 1947, since amended): "Where the Secretary of

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committed the woman concerned was on licence from an institution for defectives to which she had been sent as a "moral defective" pursuant to an order made by the Secretary of State in July, 1947, in purported exercise of his powers under section 9 of the Act. At the trial the prosecution produced the two medical certificates which were before the Secretary of State at the time that he made the order and upon which he had to be satisfied that the woman was a defective. Neither certificate contained any evidence on which it could be said that the woman was a moral defective within the meaning of section 1 (1) (*d*) of the Act:—

Held, (1) that section 56 of the Mental Deficiency Act, 1913 (now section 8 of the Sexual Offences Act, 1956), applied only in respect of girls or women lawfully made subject to the Act and had no application to those unlawfully detained in an institution, even though they might be under care and treatment; as the woman concerned had been unlawfully detained, she needed no licence to leave the institution and the appellant could not be guilty of an offence charged under the section.

(2) That upon a prosecution for an offence under the section evidence must be given by the production of the relevant documents that the woman in respect of whom the charge is made was at the time of the offence lawfully subject to the Act.

Per Donovan J. The fact that the woman had never been classified as a defective within section 1 could not be cured at the trial by proof that she could have been placed in one of the categories specified in that section. Section 56 does not deal with potential "defectives."

APPEAL against conviction.

On May 25, 1957, the appellant, John Shortriggs Head, was convicted at Cumberland Assizes on an indictment containing two counts charging that on two dates in October, 1956, he had carnal knowledge of a female mental defective who was out on licence from Dovenby Hall Hospital, an authorized institution for mental defectives, contrary to section 56 (1) (*a*) of the Mental Deficiency Act, 1913. The appellant was sentenced to four months' imprisonment on each count, to run concurrently. There was

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"State is satisfied from the certificate of two duly qualified medical "practitioners that any person who "is . . . undergoing detention in a "place of detention by order of a "court, or in a reformatory or industrial school . . . is a defective, "the Secretary of State may order "that he be transferred therefrom "and sent to an institution for defectives . . . and any order so made "shall have the like effect as if it had "been made by a judicial authority "on petition under this Act."

S. 56: "(1) Any person—(*a*) who "unlawfully and carnally knows, or "attempts to have unlawful carnal "knowledge of, any woman or girl "under care or treatment in an "institution or certified house or "approved home, or whilst placed "out on licence therefrom or under "guardianship under this Act; . . . "shall be guilty of a misdemeanour ". . . unless he proves that he did "not know, and had no reason to "suspect, that the woman or girl was "a defective."

no dispute at the trial that sexual intercourse had taken place on the occasions alleged, and the appellant did not rely on the defence allowed by section 56 that he did not know and had no reason to suspect that the woman was a defective. The only points raised at the trial were (1) whether the woman concerned was legally detained as a mental defective and whether at the material time she was on licence from an institution, and (2) if she was, whether the prosecution had proved all the material matters necessary for a conviction.

In April, 1945, the woman, then 16 years of age, was brought before justices under section 62 of the Children and Young Persons Act, 1933, on a complaint by her father that he was unable to control her, and the justices made an order under section 72 (3) of that Act committing her to an approved school. The record made by the justices pursuant to section 72 (2) and sent to the person in charge of the school gave no indication of mental deficiency, but stated that her school character was good, her ability average, though her character in employment was unsettled and unsatisfactory. A medical report dated August 3, 1945, attached to the report, stated that her mental ability was apparently normal. She remained at an approved school until July 2, 1947, on which date an order was made by the then Secretary of State under section 9 of the Mental Deficiency Act, 1913, transferring her from the approved school to an institution for defectives, and she was transferred to the Moss Side Mental Institution, Liverpool, on July 21, 1947. The two medical certificates dated June 10, 1947, on which the Secretary of State acted, purported to show that the woman was a "moral "defective" within the meaning of section 1 (1) (*d*) of the Act of 1913, but neither contained any evidence of mental defectiveness or of any strongly vicious or criminal propensities or that the woman required care, supervision and control for the protection of others. Further continuation orders were made under the Act and the regulations made thereunder, and the woman was subsequently transferred to Dovenby Hall Hospital. On October 31, 1955, she was released on licence to go to a school at Keswick as a domestic servant, and at and after the time of the alleged offences she was so detained.

At the trial the prosecution produced the two medical certificates dated June 10, 1947. A Dr. Ferguson, giving evidence for the prosecution, said that in 1954 he had regraded the woman as a feeble-minded person within the meaning of section 1 (1) (*c*) of the Mental Deficiency Act, 1913.

On July 23, 1957, the Court of Criminal Appeal gave leave to appeal and requested that the Board of Control might be represented at the hearing of the appeal. The appellant was granted bail pending the appeal.

G. W. Guthrie Jones for the appellant. There is no dispute that sexual intercourse took place. The questions are (1) whether the woman concerned was legally detained as a mental defective and whether she was on licence, and (2) if the answers are in the affirmative, whether the prosecution proved all the material matters necessary for a conviction.

[*Sir Reginald Manningham-Buller Q.C., A.-G.*, and *Rodger Winn* intervened to say that they did not propose to argue that the order made by the Secretary of State on July 2, 1947, was a valid order.]

The medical certificates upon which the Secretary of State acted contained no evidence of mental deficiency coupled with strongly vicious or criminal propensities in the woman, nor any evidence that she required care, supervision and control for the protection of others. Accordingly, from July, 1947, she was never validly detained in the various mental institutions, and when she was allowed out on licence in October, 1955, was a free woman. If habeas corpus proceedings had been brought on her behalf, they would have been successful: *Reg.* v. *Board of Control, Ex parte Rutty.*[2] The mere absence of such proceedings can make no difference to her status; de facto detention cannot be clothed with legality.

The appellant could not in those circumstances be guilty of an offence under section 56 (1) (*a*) of the Mental Deficiency Act, 1913, as the woman was neither a mental defective nor out on licence within the meaning of the Act. [Reference was also made to *Rex* v. *Judge Radcliffe, Ex parte Oxfordshire County Council*[3] and *Rex* v. *Board of Control* (*Secretary*), *Ex parte Abdul Kayum.*[4]]

Sir Reginald Manningham-Buller Q.C., A.-G., and *A. S. Booth* for the Crown. It is conceded that the Secretary of State had no power to make the original order, but it is not admitted that the woman was not at that time certifiable as a feeble-minded person. The statute does not place on the prosecution the burden of proving the legality of the original detention and the legality of its continuation, but only (1) carnal knowledge (2) of a person who at the relevant time is either under care and treatment in an institution or certified house or approved home or placed out on licence therefrom. The reason is that such a person is to be presumed to be a mental defective under the Act.

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[2] [1956] 2 Q.B. 109; [1956] 1 All E.R. 769.

[3] [1915] 3 K.B. 418; 31 T.L.R. 610.

[4] [1949] 1 K.B. 183; 65 T.L.R. 39; [1948] 2 All E.R. 853.

[LORD GODDARD C.J. That would mean that if a woman were lured into an institution for defectives she would be deemed to be a mental defective even though she were never certified as such.]

[DONOVAN J. Does not the proviso to section 56 (1) indicate that the section is based on the assumption that the person concerned is a mental defective?]

Yes. If a woman is under care and treatment at one of the institutions referred to in the Act, she is deemed to be a defective, but that is a rebuttable presumption and the defence can prove she is not. The medical certificates show not that the woman was not a defective but that the order was made on the wrong ground. The object of the section is to protect defectives; the legality of the detention is immaterial. If during the course of a prosecution under section 56 (1) (*a*) it was proved that the detention was illegal, it would be open to the prosecution to call evidence to establish that the woman was in fact a mental defective. There was unchallenged medical evidence called at the trial that the woman concerned was a mental defective.

[LORD GODDARD C.J. But that matter was never left to the jury. The judge directed them that they could not look behind the order.]

The judge was correct: see *Smith* v. *East Elloc Rural District Council*,[5] *per* Lord Radcliffe.[6] It would be proper to leave that question to the jury on a prosecution under section 56 (1) (*b*), (*c*), (*d*) or (*e*).

[LORD GODDARD C.J. "Under care or treatment" must mean lawfully under care or treatment. The prosecution produced the original and continuation orders at the trial and the defence were entitled to say they were bad on their face.]

There is no requirement in the Act that the detention must be lawful. It was not necessary for the prosecution to produce the documents. Trials under section 56 (1) should not develop into an inquiry into the medical history of the woman concerned.

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[5] [1956] A.C. 736; [1956] 1 All E.R. 855.

[6] [1956] A.C. 736, 739.

Rodger Winn for the Home Office and the Board of Control.

Cur. adv. vult.

Oct. 21. LORD GODDARD C.J. said that the appeal would be allowed and the conviction quashed. They would give their reasons later.

Nov. 1. LORD GODDARD C.J. This case is one of such importance that the court deems it convenient that they should exercise their powers under section 1 (5) of the Criminal Appeal Act, 1907, and two judgments will be delivered. Havers J. was to have delivered the second judgment, but he is ill, and he authorizes me to say that he agrees with both the judgments about to be delivered.

The court has already allowed the appeal in this case and quashed the conviction, and now proceed to give their reasons.

The appellant was convicted before Hinchcliffe J. at the Cumberland Summer Assizes on two counts, each charging him with having carnal knowledge of a mental defective contrary to section 56 (1) (*a*) of the Mental Deficiency Act, 1913, and the particulars charged that on two days in October, 1956, he had carnal knowledge of a woman on licence from Dovenby Hall Hospital, an institution for mental defectives. It was not disputed that the accused had carnal knowledge of the woman on each of the occasions charged or that he knew that she had been an inmate of the institution and was on licence therefrom, in the sense that he knew she had been permitted to leave it to go to a school at Keswick as a domestic servant. In fact she had been licensed so to do. The defence was that the woman had never legally been certified as a mental defective, that her detention for care and treatment had been illegal, and that consequently she was not subject to any licence, so that no offence had been committed.

The prosecution called as their first witness the medical superintendent of the hospital, who produced the various orders that had been made in respect of this woman, and the relevant documents under which she had been detained for care and treatment, and he proved that he had given her a licence under which she was allowed to leave the hospital on condition that she went out to service at the school. The history obtained from the documents produced showed that in April, 1945, when she was 16 years old, she was committed by justices to an approved school under section 72 (3) of the Children and Young Persons Act, 1933. She had been brought before the justices under section 62 of that Act by her father, a widower, on his complaint that she was a child he was unable to control. The record of information prepared pursuant to section 72 (2) of the Act stated that her conduct at school gave no trouble, that her school character was good, that she was somewhat forward and her ability average, but her character in employment was unsettled and not satisfactory. The medical report described her mental ability as apparently normal. The justices made an order and she was sent to a Roman Catholic approved school, where she stayed until July 2, 1947. On that day an order was made by the Secretary of State under section 9 of the Mental Deficiency Act, 1913, transferring her from the approved school to an institution for defectives. [His Lordship read section 9 of the Mental Deficiency Act, 1913.]

It is, indeed, difficult to understand how this order came to be made. The two medical certificates purport to show that the girl was a moral defective and no attention seems to have been paid to the definition of a moral defective in the Act. It must be found that there exists mental defectiveness coupled with strongly vicious or criminal propensities in a person who requires care, supervision and control for the protection of others. This definition must have been entirely ignored or overlooked both by the certifying medical men, and must have escaped the attention also of the Secretary of State and his advisers. There is nothing in the certificates to justify this girl being classed as a moral defective, troublesome, wayward or even immoral though she may have been. The Attorney-General, who has appeared to support the conviction, and Mr. Rodger Winn, who appeared for the Board of Control, as the court on granting leave to appeal asked that they should be represented to give any information that the court might require, both stated that they could not contend that this order was valid. It is indeed disturbing to find that this young woman has been subject to an order classifying her as a moral defective and therefore subject to the provisions of the Act of 1913 from July, 1947, to October 16, 1957, which is now admitted to have been illegal. Had it been brought before this court by certiorari or on an application for habeas corpus, the girl would have been immediately discharged, and the court cannot but regret that the Board of Control, who have the administration of this Act and must be presumed to be thoroughly acquainted with its provisions, have all these years treated it as valid and apparently never questioned it. They did not discharge the girl until after leave to appeal had been granted by this court and, indeed, only a few days before the appeal was due to be heard.

The material words of section 56 of the Mental Deficiency Act, 1913, are: "(1) Any person—(*a*) who unlawfully and carnally "knows, or attempts to have unlawful carnal knowledge of, any "woman or girl under care or treatment in an institution or "certified house or approved home, or whilst placed out on "licence therefrom or under guardianship under this Act . . ." is guilty of an offence. The Attorney-General submitted that all that the prosecution had to prove to establish a case in addition to the fact of carnal knowledge having taken place was that the girl was in fact in an institution for care or treatment, or that she was out on licence from such an institution. He submitted that the section did not require proof that the girl was a defective. By section 71 "institution" means "certified institution," and the latter expression means that it is one in respect of which a certificate has been granted to the managers to receive defectives, and that must mean defectives under the Act. It is true that paragraphs (*b*) to (*e*) of section 56 (1) refer in terms to defectives, and paragraph (*a*) does not, no doubt because it would be presumed prima facie that a person who was in a certified institution was a defective within the Act. In my opinion, the concluding words of the paragraph, the words "under this Act," apply to a girl under care or treatment in an institution, and also when placed out on licence, as well as to one under guardianship. To put it shortly, unless the woman or girl is a person who has been made subject to the Act the section does not apply. It cannot, we think, have any application to the case of a woman who had not been found to be a mental defective under the Act, still less to one who is unlawfully detained in an institution though she was being subjected to care and treatment; and if she was unlawfully detained, she needed no licence to go out. What the statute is making unlawful is carnal knowledge of a defective, and that must mean a mental defective under the Act. As the girl in this case had never been lawfully made subject to the Act, it follows that no offence had been committed. So that there may be no doubt on the matter, I desire to say that where a man is prosecuted for this offence, which is now an offence against section 8 of the Sexual Offences Act, 1956, evidence must be given by the production of the relevant documents that the woman in respect of whom the charge is made was at the time of the offence lawfully subject to the Act.

DONOVAN J. I need not repeat the facts. The question of law is whether the woman involved was at the time of the commission of the alleged offence a "defective" within the meaning of section 56 (1) (*a*) of the Mental Deficiency Act, 1913.

The long title of that Act states its purpose to be the making of further and better provision for the care of feeble-minded and mentally defective persons; and section 1, as subsequently amended, enacts that four classes of persons—which are carefully defined—shall be deemed to be defectives within the meaning of the Act.

One of these is as follows: "Moral defectives, that is to say, "persons in whose case there exists mental defectiveness coupled "with strongly vicious or criminal propensities and who require "care, supervision and control for the protection of others." Section 2 provides that a person who is a defective may be placed in an institution for defectives. Here the expression "who is a "defective" must, as a matter of construction, mean a person in one of the four categories defined in section 1.

Section 4 of the Act lays down how defectives, other than those dealt with at the instance of their parent or guardian, are to be dealt with. An order may be made by a judicial authority (defined in section 19), a court, or the Secretary of State, according to the circumstances. Sections 5 to 9 lay down precise requirements for the making of such orders; and sections 10 to 12 deal with their effect and duration; section 11 contains powers for the making of further orders on the expiration of the original or later order.

Section 41 gives power to the Secretary of State to make regulations about a number of matters including—see paragraph (*h*) of subsection (1)—"the absence of patients from "institutions under licence or temporarily without licence." Since the woman involved in the present case was away from the institution on licence, it is perhaps desirable to say in passing that the expression "patient" is used in various paragraphs of section 41 (1) and is obviously used as a synonym for "defective." See also sections 42, 49 (2) and 51 (3), where the same thing occurs.

Then one comes to Part IV of the Act headed "General. "Offences; legal proceedings, etc.," in which section 56 finds its place. Section 56 (1) (*a*) reads: "(1) Any person—(*a*) who "unlawfully and carnally knows, or attempts to have unlawful "carnal knowledge of, any woman or girl under care or treatment "in an institution or certified house or approved home, or whilst "placed out on licence therefrom or under guardianship under "this Act . . . shall be guilty of a misdemeanour and shall be "liable upon conviction on indictment to be imprisoned . . . for "any term not exceeding two years unless he proves that he did "not know, and had no reason to suspect, that the woman or girl "was a defective."

It is clear from the earlier sections of the Act to which I have referred that section 56 (1) (*a*) is dealing with "defectives" who are under care and treatment, etc., though that word is not actually used in paragraph (*a*) as it is in each of the four succeeding paragraphs. But the concluding words of the section giving a defence to a man if he did not know or suspect that the girl or woman was a defective place the matter beyond all doubt; and, indeed, the prosecution suggest no other view.

If, then, section 56 (1) (*a*) is dealing with defectives, what is a defective? It must mean, in this context, a person who has been found to belong to one of the four categories of defectives specified in section 1, and who is, in consequence of an order made under the Act, having care or treatment in an institution, or is out on licence by virtue of regulations made under the Act. That leads to the question: Was this woman such a defective?, and the answer is: No, because she was not found to belong to one of the said four categories, and was therefore not "a defective "within the meaning of this Act": see section 1. She was placed in a category which is unknown to the Act. The prosecution was therefore never competent from the outset, since the woman lacked the necessary status to bring section 56 into operation.

The Attorney-General argued that this defect was cured because there was unchallenged medical evidence at the trial that the girl was in fact a mental defective. So he says that fact, coupled with proof that she was out on licence from the institution, validates the prosecution. The answer to this is that whether she was mentally defective or not, she was not a defective within the meaning of the Act, since at the time of the alleged offence (which is the material time) she had never been classified as section 1 requires, and as the language of section 9 also necessitates, before an order can be made. This defect in the prosecution's case was fundamental, and could not be cured at the trial by offering to prove there and then that she *could have been* placed in one or other of the categories specified in section 1. Section 56 does not deal with potential "defectives" but only with those in whose case the classification prescribed by the Act has taken place, followed by an appropriate order under the Act.

For the like reason, the re-classification of the woman as a feeble-minded person which Dr. Ferguson apparently made of his own motion in 1954 is also ineffectual, even if valid. One reason why I add that last qualification is because of the explanation given by Dr. Ferguson for his action. "I am not "very keen on this 'moral defective,'" he is reported as saying, "it is very difficult."

The Attorney-General was anxious to avoid prosecutions under this section involving a trial within a trial to determine the legality of the patient's detention. As I see it, however, that question is not really the issue. Illegality of detention is simply a consequence which flows from any failure to give a person the status of a defective under the Act.

At the same time I agree that the expression "under care "or treatment in an institution or certified house or approved "home, or whilst placed out on licence therefrom or under "guardianship" in section 56 (1) (*a*) means that the woman or girl is lawfully so being dealt with. It is not to be supposed that Parliament was legislating for persons unlawfully detained in mental institutions, and in any event the words which follow those I have quoted make the matter clear. They are "under "this Act," which are, in my view, to be read distributively, and so apply to the expression "under care or treatment" and to the expression "whilst placed out on licence."

Accordingly, I think the prosecution were right to produce the various documents relating to the woman's detention, and to produce the licence. Nor do I think that such a practice, which ought to be followed, can lead to any great difficulty unless there are many of these patients illegally detained, which I prefer not to suppose.

Finally, upon the whole case I desire to associate myself with the comments which have fallen from the Lord Chief Justice.

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions; Solicitor to the Ministry of Health for the Home Office and the Board of Control.*

JONES *v.* MERSEY RIVER BOARD.

C. A.

1957
Oct. 8.

Jenkins, Parker and Pearce L.JJ.

Land Drainage — Compensation — Spoil deposited on riparian land— Liability of river board — " Banks " — Land Drainage Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 44), *ss.* 34 (1) (3), 38 (1), 81.

At the hearing of a claim by a riparian owner against a river board in respect of damage caused by the deposit on his land of spoil removed during the execution of certain works of improvement, it was agreed that the following preliminary questions of law as to the construction of the Land Drainage Act, 1930,[1] should be put to and decided by the Lands Tribunal:—

(1) Whether the words "without making payment therefor or "giving compensation in respect thereof" in section 38 (1) only govern the words immediately following up to "dredging any "watercourse" or whether they govern the whole of the remainder of the subsection, i.e., does the protection given by the subsection merely extend to the actual appropriation and disposal of the spoil?

(2) The meaning, effect and interpretation of the word "banks" in section 38 (1).

(3) Whether the word "other" in the phrase "or . . . in any "other manner for the maintenance or improvement of those

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[1] Land Drainage Act, 1930, s. 34: "(1) Every drainage board acting "within its district shall have power— "(*a*) to maintain existing works, that "is to say, to cleanse, repair or "otherwise maintain in a due state "of efficiency any existing water-"course or drainage work: (*b*) to "improve any existing works, that is "to say, to deepen, widen, straighten, "or otherwise improve any existing "watercourse, or remove mill dams, "weirs or other obstructions to "watercourses, or raise, widen, or "otherwise improve any existing "drainage work: (*c*) to construct new "works, that is to say, to make any "new watercourse or drainage work "or erect any machinery or do any "other act not hereinbefore referred "to, required for the drainage of the "area comprised within their district "... (3) Where injury is sustained "by any person by reason of the "exercise by a drainage board of any "of its powers under this section, the "board shall be liable to make full "compensation to the injured person, "and in case of dispute the amount "of the compensation shall be deter-"mined in the manner in which "disputed compensation for land is "required to be determined by the "Lands Clauses Acts. . . ."

S. 38: "(1) A drainage board, "without making payment therefor "or giving compensation in respect "thereof, may appropriate and dis-"pose of any shingle, sand, clay, "gravel, stone, rock or other matter "removed in the course of the execu-"tion of any work for widening, "deepening or dredging any water-"course, and may deposit any matter "so removed on the banks of the "watercourse or use it in any other "manner for the maintenance or "improvement of those banks or for "the purposes of the execution of any "other work which the drainage board "have power to execute . . ."

S. 81: ". . . 'Banks' means "banks, walls, or embankments "adjoining or confining, or con-"structed for the purposes of or in "connexion with, any channel or sea "front, and includes all land between "the bank and low-water mark: . . ."

"banks" in section 38 (1) implies that a deposit of spoil, etc., is to be made for those purposes (i.e., maintenance and improvement) and for no other purpose.

On appeal from the decisions given:—

Held, (1) that the words "without making payment therefor "or giving compensation in respect thereof" meant that a river board might use the materials removed for the purpose specified without making or giving any payment or compensation for the materials so used, the ordinary right to compensation being excluded only so far as the materials used were concerned.

(2) That, while the meaning of the word "banks," being largely a matter of fact to be decided in accordance with the circumstances of a particular case, was unsuitable for determination as a preliminary point, it could fairly be said that the word indicated so much of the land adjoining or near a river as performed or contributed to the performance of the function of containing the river: observations in *Howard* v. *Ingersoll*, 54 U.S. 381 at p. 427 (cited in *Hindson* v. *Ashby* [1896] 1 Ch. at p. 84) and in *Monmouthshire Railway and Canal Co.* v. *Hill* (1859) 28 L.J.Ex. at p. 285 applied.

(3) That the permitted deposit was limited to one which in fact contributed to the maintenance or improvement of the banks.

CASE STATED by the Lands Tribunal (Erskine Simes Q.C.).

The claimant, Albert Jones, who farmed land adjoining the river Alt, claimed compensation under section 34 (3) of the Land Drainage Act, 1930, for injury claimed to have been suffered in consequence of the action of the Mersey River Board in depositing on his land spoil removed by them in the process of widening and improving the course of the river under powers conferred by the Act. The board denied liability to pay compensation, relying on section 38 (1) of the Act. It was agreed between the parties that three questions of law involving the construction of the Act (set out in the headnote above) should be decided as preliminary points of law, and the President, under rule 37 of the Lands Tribunal Rules, 1949, made an order to that effect.

In giving the decision of the tribunal, Mr. Simes, after stating the facts and citing the relevant portions of the Act, continued: "Mr. Dewhurst, on behalf of the claimant, in the "first place submitted that the words 'without making payment "'therefor or giving compensation in respect thereof' in section "38 (1) governed only the words immediately following as far "as 'dredging any watercourse.' In other words, the section "entitles the board, without payment or compensation, only to "appropriate and dispose of material removed but does not "entitle them to deposit it on the banks without payment of "compensation for injury caused to the owner of the land by "such deposit. He relied on the fact that the word 'injury' "used in section 34 (3) was not repeated in section 38 (1). He "further contended that the subsection should be construed "against the board since it must not be assumed that Parliament "would have deprived a party injured of compensation without "clear words to that effect. He urged the same canon of con-"struction in support of his other contentions.

"In the alternative he contended that if material removed "could be deposited on the banks without payment of compen-"sation, it could only be so deposited if such deposit was 'for "'the maintenance and improvement of those banks or for the "'purposes of the execution of any other work which the "'drainage board have power to execute.' In support of this "contention he relied upon the words 'in any other manner' as "showing that the preceding words must be used ejusdem generis "with those which followed.

"In the further alternative he contended that in the present "case the area of land on which the spoil had been deposited "could not be described as 'the banks of the watercourse' "extending as it did in places to a depth of at least 20 yards "from the edge of the watercourse and covering an area of "something like two and a quarter acres. As the facts were not "wholly agreed he asked me to define the interpretation of the "word 'banks' in the section.

"First he contended that the right to compensation given "by section 34 (3) was an unrestricted right once injury is "proved, that section 38 makes no reference to injury and does "not therefore affect the right to compensation given by "section 34 (3).

"Mr. Mais, on behalf of the board, contended that section "38 (1) was clear and unambiguous and that the use of the "words 'giving compensation in respect thereof' in addition to "'making payment therefor' showed that Parliament had "clearly in mind the second part of the subsection in respect of "which compensation would have been the appropriate remedy.

"In answer to Mr. Dewhurst's first alternative contention he "submitted that in the context of the section the use of the "words 'any other manner' could not import an ejusdem generis "meaning to the earlier words, and that any such meaning would "in effect nullify the powers conferred on the board by the "subsection.

"He contended that the meaning to be given to the word "'banks' is one of fact and degree dependent upon the circum-"stances of each case and should not be defined without a full "consideration of all the evidence in any particular case.

"Finally he contended that the provisions of section 38 (1) "were either an exception to the right to compensation conferred "by section 34 (3) or that the powers conferred by section 38 (1) "were powers additional to those conferred by section 34 (1) and "did not therefore fall within the ambit of section 34 (3), which "refers to 'the exercise of any of its powers under this section,' "and that in relation to the powers conferred by section 38 (1) "Parliament had expressly excluded a right to compensation.

"I have arrived at the decision that, in view of the situation "of the words 'without making payment therefor or giving "'compensation in respect thereof' before any of the powers "conferred by subsection (1) of section 38, it is clearly intended "that they should govern all powers conferred by that sub-"section and that the board are not therefore liable to pay "compensation in respect of the deposit of material under that "subsection upon the banks of the watercourse.

"It is therefore necessary to consider whether the powers of "depositing on the banks is limited in the manner contended for "on behalf of the claimant. While section 34 gives a power to "widen, it makes no provision for the disposal of any soil "removed. That power is contained in section 38, and the "section, in my view, sets out the different ways in which it "would naturally be dealt with, that is to say, by sale, by "deposition on the banks, for use in other ways by the board, "or by having the material removed by the local authority. "The use of the word 'other' in the subsection appears to me "to be imported into the subsection in this sense rather than "with a view to an ejusdem generis restriction on the power to "deposit. I am therefore satisfied that the powers of the board "to deposit material on the banks is not limited to cases in "which by so doing they will maintain or improve those banks.

"What is meant by the 'banks' in the subsection is far "from clear. The definition in section 81 of the Act affords "little or no assistance in construing the subsection. I was "referred to *North Level Commissioners* v. *River Welland* "*Catchment Board*[2] as showing that some limitation must be "put upon the word, but I find no assistance therein in arriving

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[2] [1938] Ch. 379; 54 T.L.R. 263; [1937] 4 All E.R. 684.

"at the question before me. In *Cheshire Lines Committee* v. "*Heaton Norris U. D. C.*,[3] where the meaning of 'bank' in "section 30 of the Public Health Acts Amendment Act, 1907, "was under consideration, Darling J. said: 'I am very much "'inclined to think that the "bank" mentioned in section 30 "'is not what we usually call the bank of a river, as when we "'say a person lives on the banks of the Thames or that he "'keeps his flocks on the banks of the Danube, or anything of "'that kind. . . . If one speaks of the banks of the river in "'that sense, it is a much wider thing; I think it would go "'beyond the footpath and might go a mile inland; the bank "'cannot be limited to the little strip between the footpath and "'the river.'

"I was also referred to the dictum of Curtis J. in *Howard* v. "*Ingersoll*,[4] before the Supreme Court of the United States, "cited with approval by Romer J. in *Hindson* v. *Ashby*,[5] that "'the banks of a river are those elevations of land which confine "'the water when they rise out of the bed.' This seems to me "to be as accurate a definition as possible of what is understood "to be the bank in a limited sense.

"The word 'bank' has in its natural connotation the idea "of a slope, and I have formed the conclusion that in this sub-"section, limiting as it does the general right to compensation "under section 34 (3), the word 'banks' should be given this "limited sense, and that accordingly the board have no right "under the subsection to deposit material removed upon the "adjoining fields but only upon what may properly be termed "the 'bank' within this limited meaning.

"Finally, I am satisfied that the provisions of section 38 (1) "excluding compensation are not overruled by the provisions of "section 34. I think that they form an exception to those "provisions and that in so far as in the present case the injury "suffered by the claimant is not excluded by section 38 he is "entitled under section 34 (3)."

The river board appealed against the decision under question (2), as set out in the headnote. The claimant cross-appealed against the findings under questions (1) and (3).

Michael Rowe Q.C. and *R. H. Mais* for the river board. As regards the point raised by the board's appeal, section 81 is not helpful as a definition; it is difficult and unsatisfactory to put a construction on the words taken alone and not in relation to the circumstances of a particular site. The tribunal have given the word a limited sense and associated with it the idea of a slope. That is quite impracticable from the point of view of the board; it is impossible to deposit mud on a slope and there is often a vertical face with no slope at all. Every case should be looked at in the light of its own facts, having regard to the surroundings and the amount of the deposit necessary; there must be a sufficient width of land to bear the deposit; it must stretch some way from the water's edge.

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[3] [1913] 1 K.B. 325, 334; 28 T.L.R. 576.

[4] (1851) 54 U.S. 381, 427.

[5] [1896] 1 Ch. 78, 84.

So far as the authorities are concerned, some help is to be obtained from the American case, *Howard* v. *Ingersoll*,[6] cited by the tribunal; and Martin B. said much the same in *Monmouthshire Railway and Canal Co.* v. *Hill*[7]; in both cases there is the idea of a strip of land which confines the water. The *Heaton Norris* case,[8] also cited by the tribunal, was concerned with a very different Act. An Act must be construed with common sense so as not to produce an impracticable result: see the observations of Singleton L.J. in *Falmouth Boat Construction Co. Ltd.* v. *Howell*.[9]

The tribunal has gone wrong in law by adopting too narrow a construction. The powers and duties of the board include widening as well as deepening and draining; the quantity of spoil to be removed must be taken into consideration and also the question of how wide a space is required for its deposit, so as to ensure stability; the right of deposit would be useless unless the material could be deposited near the edge in some way so as not to endanger stability. The case should be remitted for the tribunal to deal with it in a common-sense way having regard to all the considerations involved.

As regards the contentions of the claimant, the powers and duties of the board set out in section 34 are a repetition of what was contained in previous Acts, while the exempting provisions of section 38 (1) are new; it is clear that the intention was to give the boards powers of depositing spoil without payment or compensation. [Reference was made to *In re Moulton and Middle Level Commissioners*.[10]]

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[6] 54 U.S. 381.

[7] (1859) 28 L.J.Ex. 283, 285.

[8] [1913] 1 K.B. 325.

[9] [1950] 2 K.B. 16, 30; 66 T.L.R. (Pt. 1) 487; [1950] 1 All E.R. 538.

[10] (1907) 97 L.T. 391.

G. D. Squibb Q.C. and *K. W. Dewhurst* for the claimant. In construing "banks" as it did, the tribunal was only doing what it had been asked to do, with the consent of the board. The tribunal did not construe the word so narrowly as the board contended it did; the decision must be taken to adopt the language of the American judgment.

As regards the first point in the claimant's appeal, the provision for compensation in section 34 (3) is not prefaced by "subject "to the provisions of this Act." Section 34 confers the power to execute drainage works, and section 38 (1) is merely ancillary, helping the board to deal with the spoil which they have necessarily removed. It excludes compensation for such removal, but any work done is done under the powers of section 34 and is accordingly subject to compensation; section 38 (1) is concerned with materials, and not with work, and the freedom from compensation is limited to the removal by the board of materials not their property.

As regards the second point, the use of the word "other" indicates that deposit is only one way of improving or maintaining the banks; it is maintenance or improvement that is always in view. The word "other" is apt to cut down the scope of a wide expression preceding it: see *Shuttleworth* v. *Le Fleming*[11] and *Mounsey* v. *Ismay*.[12]

Rowe Q.C. "Banks" must mean such area as is necessary to confine the waters of the particular river; a precise definition in vacuo is impossible.

The words "without making payment therefor," etc., must refer to both parts of the subsection, not merely to the appropriation and disposal. The expression "use it in any other manner" does not have an ejusdem generis significance or cut down the generality of the purposes for which spoil may be used.

Squibb Q.C. replying on the cross-appeals. Exclusion from financial liability is limited to the actual materials removed and to the damage to the land caused by their severance. "Payment "therefor" relates to the chattel removed from the land, and "compensation in respect thereof" to the damage caused by such removal. Neither expression relates to the operations of the board in subsequently disposing of the spoil.

Rowe Q.C. replying on the last submission. Section 38 (1) must have reference to operations as well as to materials. Section

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[11] (1865) 19 C.B.N.S. 687.

[12] (1865) 3 H. & C. 486.

34 gives the board no power to deposit spoil; without more, the board would have to take it right away. Section 38 (1) is concerned to give the board an ancillary power involving action, e.g., depositing the materials. Without such power the board could not take spoil free from A's land to be used for works on the land of B. The intention was to frank both the severance and the disposal.

Jenkins L.J. The proceedings in which these appeals arise are brought by Albert Jones, of Orrell Hill Farm, Hightown, near Liverpool, for compensation for damage to his land which he claims to have sustained through the operations of the Mersey River Board.

The tribunal dealing with the matter is the Lands Tribunal, to which these questions of compensation are nowadays referred. It appears that Jones owns land adjacent to the River Alt, and that in purported exercise of their statutory powers under the Land Drainage Act, 1930, the Mersey River Board dredged the river and deposited considerable parts of the material dredged upon Jones' land. Jones asserts that the spoil dredged out of the river covered a substantial area of good agricultural land, and he claims compensation.

In the course of the proceedings, certain preliminary points were raised on behalf of Jones. In due course those points were decided by Mr. Erskine Simes, who in this case constituted the tribunal, and Jones appeals from Mr. Simes' decision on two of those points, while the Mersey River Board appeals on a third. The position actually is that the Mersey River Board is appellant and Jones is respondent in the main appeal, with a cross-appeal by Jones on the two points upon which he failed before the tribunal.

I will refer as briefly as I can to the pertinent provisions of the Land Drainage Act, 1930. Under that Act, the land drainage system of the country was reorganized, and the organization comprised drainage boards and catchment boards. As I understand it, the functions of the catchment boards have been transferred by the River Boards Act, 1948, to river boards, of which the Mersey River Board is one.

I think it is only necessary to refer to two or three sections of the Act. [His Lordship read section 34 (1) and (3), section 38 (1) and the definition in section 81 and continued:] The points of law raised concern the construction of section 38 (1) of the Act.

The points were these: "(a) Whether the words 'without making "'payment therefor or giving compensation in respect thereof' "in section 38 (1) of the Land Drainage Act, 1930, only govern "the words immediately following up to 'dredging any water- "'course' or whether they govern the whole of the remainder "of the subsection, i.e., does the protection given by the sub- "section merely extend to the actual appropriation and disposal "of the spoil." That question the tribunal decided against Jones. Then taking them out of their order, the third one, (c), was: "Whether the word 'other' in the phrase 'or . . . in any other "'manner for the maintenance or improvement of those banks' "in section 38 (1) of the Land Drainage Act, 1930, implies that a "deposit of spoil, etc., is to be made for those purposes (i.e., "maintenance and improvement) and for no other purpose." That point also the tribunal decided against Jones.

I now come to the second point in order. There was a fourth one, with which we are not now concerned, but the second one was this: "(b) The meaning, effect and interpretation of the "word 'banks' in section 38 (1) of the Land Drainage Act, "1930." That second question the tribunal answered by placing a limited construction on the word "banks," which satisfied Jones but by no means satisfied the Mersey River Board. In those circumstances the Mersey River Board now appeals from the decision on point (b), whereas Jones cross-appeals on points (a) and (c).

As to the Mersey River Board's appeal, there is very little in the Act to aid the court in coming to a conclusion as to the meaning of the word "banks." There is, indeed, nothing except the circumstance that the word "banks" appears in the context of an Act concerned with land drainage, and except that the definition says "'Banks' means banks, walls, or embankments "adjoining or confining, or constructed for the purposes of or "in connexion with, any channel or sea front, and includes all "land between the bank and low-water mark."

The point is one which, for my part, I regard as unsuitable for determination as a preliminary point. I should have thought that the question whether a given piece of land near to or adjoining a river was part of the river bank must be a question very largely of fact to be decided in each particular case by reference to the size and habits of the river, the geological composition of the land, and the level of the land as compared with the river, and, no doubt, other circumstances of that kind. However, the

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tribunal found it possible to deal with this question of the meaning of the word " banks " more or less, one might say, in vacuo, and the matter has been debated before us. Therefore, I think it right that we should express an opinion upon it, while administering the caution that the matter is, in the last resort, very largely a matter of fact.

Mr. Erskine Simes, in his decision, said: [His Lordship read that part of the decision which related to this question and continued:] With respect to the tribunal, I am left in doubt as to the exact effect of the conclusion reached on the meaning of " banks." There is the reference to the American case of *Howard* v. *Ingersoll*[1] for the proposition that " the banks of a " river are those elevations of land which confine the water " when they rise out of the bed," but that seems to be restricted by the introduction of the idea of a slope, which is not an essential feature of that which the term " bank " conveys in its natural connotation when used in relation to a river.

Mr. Rowe would have it that the definition adopted by the tribunal has the effect of limiting the banks of a river, for the purposes of the Act, to the face of the land actually on the margin of the river—the face of the land rising at an angle, or even vertically, from the river bed. Mr. Rowe points out the impossibility of applying that definition as a practical matter. He says it would mean that the employees of the board, when they dredged the river and had occasion to put spoil on the banks, would be under the necessity of confining their operations to the actual face of the bank, rising perhaps steeply or even vertically from the river, and he says that this cannot possibly be right. I agree that, if the decision of the tribunal did in truth involve that conclusion, it could not stand for a moment; but I do not read the decision as narrowing quite to that extent the meaning of the word " banks." The meaning adopted by the tribunal was, I think, in reality, the definition given in the American case, with a qualification in the shape of the introduction of the conception of a slope as an essential element. I think that apart from the introduction of that idea, both sides would substantially agree that the definition given in the American case was satisfactory.

We were referred to a number of authorities, but I confess that I have not derived any real assistance from any of them, with the possible exception of certain observations of Martin B. in *Monmouthshire Railway and Canal Co.* v. *Hill.*[2] In that

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[1] (1851) 54 U.S. 381.

[2] (1859) 28 L.J.Ex. 283, 285.

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case a local Act for the formation of a canal required "the "owner of any land through which it was made to erect and use "any wharves" and so on "in or upon their lands adjoining or "near to the canal and to land any goods upon such wharves, "etc., or upon banks lying between the same and the canal." A question in the case was the meaning of the word "banks." Martin B. said: "I am of the same opinion, and I will treat the "case as the plaintiffs' counsel has treated it, putting it upon its "true footing, namely, the construction of the Act of Parliament. "When you speak of the banks of a canal, you mean the land "on either side of the canal which confines the water. There are "banks of the canal, therefore, on both sides of it, and when "you speak of the banks, you mean the substantial soil which "confines the water . . ."

Those observations of Martin B. accord with the view taken in the American case. So far as it is possible to decide a question of this sort save in the light of all the relevant facts in the particular case under consideration, I would adopt in substance the definition in the American case and the view expressed to the same effect by Martin B., and hold that the expression "banks" in section 38 (1) means so much of the land adjoining or near to a river as performs or contributes to the performance of the function of containing the river. I think that that is as good a definition as it is possible to provide in vacuo; but I emphasize that its application in any particular case must depend to a great extent on the particular facts of the case—the character of the river, the character of its surroundings, and, no doubt, other considerations as well.

I am fortified, in adopting the construction I have stated, by the circumstance that the expression "banks" which we have to construe does appear, as I have already said, in the context of a land drainage Act. When a land drainage Act refers to the banks of a river, one supposes that the banks referred to are those banks which are material from the land drainage point of view, that is to say, the banks which contain the river. Once one comes to that conclusion, obviously the word "banks" cannot be limited to the slope or vertical face where those banks actually meet the river, but must include, as I have said, the land adjoining or near to the river, to the extent to which it serves to contain the river. In the end, I do not think there was really much difference between the parties as to the meaning of the word "banks": I think they both were disposed, or nearly disposed,

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to adopt the definition I have given. It follows, therefore, that the appeal of the river board succeeds.

Next I come to the points (a) and (c), which are the subject of Jones' cross-appeal. I will read them again: "(a) Whether "the words 'without making payment therefor or giving "'compensation in respect thereof' in section 38 (1) of the "Land Drainage Act, 1930, only govern the words immediately "following up to 'dredging any watercourse' or whether they "govern the whole of the remainder of the subsection, i.e., does "the protection given by the subsection merely extend to the "actual appropriation and disposal of the spoil, etc." It seems to me that the words "without making payment therefor or giving "compensation in respect thereof" in section 38 (1) manifestly govern everything that follows, with the result that if this exclusion of compensation is properly to be construed as an exclusion of compensation in respect of any of the acts referred to in section 38 (1), I should have thought that all the acts therein enumerated would be in the same case as regards exclusion of compensation; but, in my judgment, on the true construction of section 38 (1), the words "without making payment therefor "or giving compensation in respect thereof" relate, and relate only, to the material (i.e., shingle and so forth) with which the section is concerned. I will refer to it again: "A drainage board, "without making payment therefor"—and "therefor," I think, means "without making payment for the material hereinafter mentioned"—"or giving compensation in respect thereof"—that is to say, in respect of that material—"may appropriate and "dispose of any shingle, sand, clay, gravel, stone, rock or other "matter removed in the course of the execution of any work for "widening, deepening, or dredging any watercourse." Prima facie, the matter in respect of which compensation is excluded seems to me quite clearly to be the physical materials removed in the course of the execution of the work referred to, and nothing else. Then come these words, "and may deposit any matter so "removed on the banks of the watercourse or use it in any other "manner for the maintenance or improvement of those banks." I think one must go back to the opening words in dealing with the passage beginning "and may deposit," and, doing so, one gets this: "A drainage board, without making payment" for "or "giving compensation in respect" of any materials of the kinds already referred to removed in the course of any work of the kinds already mentioned, "may deposit any matter so removed "on the banks of the watercourse." It seems to me reasonably clear that there again the exclusion of compensation relates to the "matter so removed." Then come the words "or use it in any "other manner for the maintenance or improvement of those "banks": "it," of course, means the matter so removed. Again, that seems to me to be qualified by the exclusion of compensation at the beginning of the section, which, however, relates, and relates only, to the material removed.

It seems to me that any doubt on this question is really set at rest when one comes to the concluding words of the subsection, "or for the purposes of the execution of any other work which the "drainage board have power to execute." That does not mean that, without paying any compensation at all for their action, the board may use the material in question for the purposes of the execution of any other work which they have power to execute. In my judgment, it can only mean that they may use the materials so removed for those purposes, without making or giving any payment or compensation for the materials so used, the ordinary right to compensation being excluded only so far as the materials used are concerned.

This point was taken by Mr. Squibb when he first addressed us, but not fully developed until his reply. That being so, it seemed to us that Mr. Rowe might not have fully appreciated until that late stage the way in which Mr. Squibb sought to put this part of the case, and, accordingly, we gave him a further opportunity of arguing the point, but nothing he then said has sufficed to displace my conclusion that this argument of Mr. Squibb's is well founded.

It seems to me that, if the section is not so construed, somewhat surprising results might ensue. It would mean, so far as I can see, that, by the terms of section 38 (1), if any work whatsoever, no matter on whose land, was carried out by the board with the material excavated or dredged up from the river, the right of compensation would be wholly excluded in such case owing to the circumstance that the matter used was dredged from the river. That would be a wholly irrelevant circumstance in the perfectly possible case of material being dredged up from A's part of the river and used in executing some work on B's part of the river. Mr. Rowe sought to escape that conclusion, but it seems to me to be really inescapable. The difficulty arises so soon as one construes section 38 as excluding compensation for the operations mentioned as distinct from the material used. Accordingly, in my view, the cross-appeal should succeed on point (a).

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Then comes point (c): "Whether the word 'other' in the "phrase 'or . . . in any other manner for the maintenance or "'improvement of those banks' in section 38 (1) of the Land "Drainage Act, 1930, implies that a deposit of spoil, etc., is to be "made for those purposes (i.e., maintenance and improvement) "and for no other purpose." That argument is based on what may be loosely described as a variant of the ejusdem generis principle, and it turns on the words "or use it in any other manner for "the maintenance or improvement of those banks." It is said, taking the words "and may deposit any matter so removed on the "banks of the watercourse or use it in any other manner for the "maintenance or improvement of those banks," that the reference to the deposit on the banks, followed by the reference to using it "in any other manner for the maintenance or improvement of those banks," has the effect of limiting the permitted deposit to a deposit which in fact contributes to the maintenance or improvement of those banks. I think that that submission should succeed.

A particular operation affecting the banks, namely, the deposit of matter on the banks, is referred to in general terms, and that is immediately followed by the words "or use it in any other "manner for the maintenance or improvement of those banks." I think that that indicates that the section is treating the first operation mentioned, the deposit, as being "for the maintenance "or improvement of those banks," and as being one of several possible means of maintenance or improvement.

In view of the opinion I have formed on the other point, this point does not seem to me to be of great practical importance. The importance, from Mr. Squibb's point of view, of narrowing down this part of the section really depends upon acceptance of the other view about the exclusion of compensation. But I think, as a matter of construction, that his argument is right. Accordingly, in my view, the cross-appeal succeeds on this point also.

Parker L.J. I have come to the same conclusion, and I will state my views in a very few words.

So far as regards the question with which the appeal is concerned, namely, the meaning to be given to the word "banks" in section 38 of the Act, I share my Lord's regret that this point was ever stated as a preliminary point. I confess that I am surprised that the river board should have been parties to that agreement when their counsel at the hearing had to take the point that whether a bit of land comprised the bank of a river must be largely a question of fact, and ought not to be decided until all the evidence had been heard. However, the matter was argued before the Lands Tribunal, and has been argued in this court, and it is only right that we should express a view upon it.

My Lord has referred to the section, and it is enough for me to say that, in my view, it is far easier to say what does not comprise a bank than what does. A bank is not used in a drainage Act in the sense in which it is often used, e.g., grazing your sheep or cattle on the banks of a river, nor can it be confined to the skin of soil, or slope, or vertical part which abuts on the river. It must be something more than that, depending on all the circumstances of the case.

For myself, I get help from the decision of Curtis J. in *Howard* v. *Ingersoll*,[3] in the Supreme Court of the United States, to which my Lord has referred, and from the judgment of Martin B.[4] I could not do better than adopt the tentative definition given by my Lord—a definition which, incidentally, I do not believe either side in these appeals would make much pother about. The trouble, I think, on this point arises because nobody really knows what the Lands Tribunal meant to decide on this point. On one view, the tribunal were merely adopting the words of Curtis J. in the Supreme Court of the United States. On another view, they were narrowing that definition by introducing, as an essential element, the idea of a slope. Both counsel before us quite rightly, I think, agreed that that conception is not essential in either case.

So far as the points raised in the court below are concerned, the first, as I understand it, was originally in this form, that the qualification " without making payment therefor or giving compensation in respect thereof " only qualified the words down to " dredging any watercourse." Indeed, the question for the decision of the tribunal was stated in that form. Moreover, as I understand it, that was the point argued before, and decided by, the Lands Tribunal. For myself, I think it is clear that that construction is plainly wrong. As a matter of grammar, those words " without making payment therefor or giving compensation in respect thereof," whatever they may mean, run right through the section.

Before this court, Mr. Squibb took a point which I confess I did not appreciate at an early stage in the argument when he

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[3] 54 U.S. 381, 427.

[4] 28 L.J.Ex. 283, 285.

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said the question was: what did the words "therefor" in connexion with payment and "thereof" in respect of compensation qualify? Were they excluding payment of compensation in respect of the physical material thereafter referred to? I confess that is a point on which I have come to the same conclusion as my Lord. It seems to me that, on a proper reading of this section, one can only treat "therefor" and "thereof" as referring to the material thereafter set out, and not the operation.

So far as the second point is concerned, namely, the effect of the words "in any other manner" following the putting of the deposit on the banks, that seems to me now largely an academic point, because, if the compensation is not excluded under this subsection in respect of the deposit on the bank, then the compensation will have to be paid in any event unless the deposit has caused no injury. But though, as I think, it will be largely academic, I agree with my Lord that, on the proper reading of these words, the deposit there referred to is intended to be a deposit which in nearly every case, no doubt, will be for the maintenance or improvement of the banks.

In saying this, I do not base it on the ejusdem generis principle, which I think as a principle has no application in such a case as this, but must be strictly confined to cases where general words follow specific works out of which a genus can be constructed; but I think the association of the words "in any other "manner," following the previous words, do indicate that the deposit should be "for the maintenance or improvement of those "banks."

For these reasons, I have come to the same conclusion as my Lord.

PEARCE L.J. I agree.

Appeal and cross-appeal allowed.
Leave to Mersey River Board to appeal.

Solicitors: *Norton, Rose & Co. for A. H. Jolliffe, Warrington; Ellis & Fairbairn.*

F. R. D.

WILLIAMS BROTHERS DIRECT SUPPLY LTD. *v.* RAFTERY.

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Nov. 14, 15.

Hodson, Morris and Sellers L.JJ.

[Plaint No. NP. 102.]

Limitation of Action—Land, recovery of—Squatter's title—User of land by trespasser for over 12 *years—No discontinuance of possession by owners—Whether owners dispossessed—Acts of user consistent with intended purpose of owners—Limitation Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *ss.* 4 (3), 5 (1), 10 (1).

The plaintiffs, the registered owners of land at the rear of a row of shops with flats above, brought an action in the county court against the defendant, the tenant of one of the flats, for possession of the strip of land at the rear of his premises, an order for the removal of certain fencing and sheds on the land, and damages for trespass. The defendant claimed that he was the owner of the land, having been in uninterrupted occupation of it for over 12 years, and that he had thereby acquired a squatter's title under the provisions of the Limitation Act, 1939.[1]

At the hearing it was shown that the plaintiffs had bought the land in 1937 and intended to develop it, but were prevented, in 1939 by the outbreak of war, and in 1948—after their representative had gone onto the land to prepare plans for building—by the refusal of planning permission, but that they had never abandoned their intention to develop it when opportunity arose. For the defendant it was shown that in 1940 the tenants of the flats had 1940 begun cultivating the land at the rear of their premises as part of the war effort, some of them obtaining oral permission from the owners to do so. One H. had cultivated the land behind flat No. 367a and marked off a boundary to it with old bricks. In 1943 the defendant became tenant of No. 367a, took over the land previously cultivated by H., without the owner's permission and

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[1] Limitation Act, 1939, s. 4: "... "(3) No action shall be brought by "any other person to recover any land "after the expiration of 12 years "from the date on which the right "of action accrued to him or, if it "first accrued to some person through "whom he claims, to that person: . . ."

S. 5: "(1) Where the person "bringing an action to recover land, "or some person through whom he "claims, has been in possession "thereof, and has while entitled "thereto been dispossessed or dis-"continued his possession, the right "of action shall be deemed to have "accrued on the date of the dispos-"session or discontinuance. . . ."

S. 10: "(1) No right of action to "recover land shall be deemed to "accrue unless the land is in the "possession of some person in whose "favour the period of limitation can "run (hereafter in this section "referred to as 'adverse possession') "and where under the foregoing "provisions of this Act any such "right of action is deemed to accrue "on a certain date and no person is "in adverse possession on that date, "the right of action shall not be "deemed to accrue unless and until "adverse possession is taken of the "land. . . ."

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without paying rent for it, and continued to grow food on it until 1949, when he abandoned cultivation and turned part of the land over to the purposes of rearing greyhounds, putting up sheds and a fence to keep the dogs in. He had had no idea of taking over the land and had not kept the plaintiffs out, but had thought that he was exercising rights over the land to which he was entitled as tenant of No. 367a:—

Held, (1) that, on the evidence, the plaintiffs had never discontinued their possession.

(2) That having regard to the nature of the property, the acts of user by the defendant did not interfere and were consistent with the purpose to which the owners intended to devote it, and were not sufficient to amount to a dispossession of them within the meaning of section 5 (1) of the Limitation Act, 1939; and that the owners were accordingly entitled to orders for possession and for the removal of the fencing and sheds, and to nominal damages for trespass.

Leigh v. *Jack* (1879) 5 Ex.D. 264 applied.

Marshall v. *Taylor* [1895] 1 Ch. 641 distinguished.

APPEAL from Deputy Judge Gilbert Dare, Edmonton County Court.

In June, 1957, the plaintiffs, Williams Brothers Direct Supply Stores Ltd., the registered owners of freehold land at the rear of premises situate behind Nos. 367, 369 and 371, Fore Street, Edmonton, brought an action in the county court against the defendant, Thomas Raftery. By their particulars of claim they stated that the defendant was the tenant of the maisonette over the shop premises, No. 367, Fore Street, known as 367a, Fore Street, the maisonette being let to him by the London Co-operative Society, which leased the whole premises from the plaintiff company. They claimed that the defendant had, without their consent or permission, wrongfully entered into or on the land at the rear of those premises and taken possession of it, had erected fencing and sheds thereon for the purpose of breeding dogs, and had committed and was still committing an act of trespass on their land; that they had by their solicitors addressed letters to him on February 25 and April 12, 1957, requesting him forthwith to remove the fencing and sheds and deliver up possession, but that he had failed to do any of those things. They claimed (1) possession of the land, (2) an order for the removal of the fencing and sheds, and (3) damages for trespass limited to £10. The defendant by his defence claimed that he was the owner of the property claimed, having been in uninterrupted occupation of the land since November, 1943, and having thereby acquired a squatter's title to it by virtue of the provisions of the Limitation Act, 1939[1]; and he claimed a declaration accordingly.

At the hearing on June 26, 1957, the defendant accepted the onus of establishing his title under the Limitation Act, 1939.[1] The facts as established on the evidence and found by the county court judge were as follows: The plaintiffs acquired the land in December, 1937; they pulled down some old cottages on it and put up shops with maisonettes over. At the back of the shops they made a roadway and between the roadway and the remaining land put up a fence with a gate. The land at the rear originally formed part of the cottage gardens, but the tenants in the new premises were cut off from that land. The plaintiffs intended to develop the land at the rear when an opportunity arose but did not intend that it should be used for any purpose in the meantime. The outbreak of war in 1939 prevented their plans for developing the land at the rear. As a result of the national "Dig for Victory" campaign, some of the occupiers of the maisonettes, each of whom had a strip at the back of his premises, decided to cultivate this land, and two of them obtained oral permission to do so.

The land in issue in the present proceedings was a small strip of the whole area at the rear of No. 367, approximately 13 feet wide and 110 feet long. In 1940 one Haydon took it over and proceeded to lay a line of bricks "down from the old "cottages" to mark it off from the land on each side, and to cultivate it. In 1943 the defendant Raftery, according to his evidence, came to the maisonette at No. 367a and decided that he would do as his neighbours did and cultivate the land at the rear of his premises. The defendant, in his own evidence, described how he had a discussion with Haydon and how his neighbours were working on either side of him, and said that he moved into the plot of land and "put in rhubarb and bulbs from "other garden before Haydon went." He continued: "Got no "permission from anyone. Never paid rent." Two of his neighbours gave up about 1947, but he had continued to work on and grow potatoes. The place was overrun with weeds, and in 1949 he went in for greyhounds, first putting up a shelter and later better sheds and a fence to keep the dogs in.

In cross-examination he referred to the cultivation of the plots by the two tenants on either side of him, and to the fact that Haydon, the man whom he had succeeded, did not live in those premises at all. He wanted the bit behind his maisonette and he thought, being tenant of No. 367a, that he was entitled to the bit behind it. He went on: "I knew other tenants were "cultivating behind their premises. I thought entitled to same. "Not trying to take over land, not really. Exercising rights I "thought I had as tenant of these premises. All three cultivated "bits. One by one, when war ended, these gave up. By 1948 "whole place overgrown barring my strip." He continued: "Done no more than grow vegetables on site. Two-thirds of the "strip down towards the concrete. I did nothing to keep the "plaintiffs off." He gave evidence about the bricks which had been put down to mark the boundary of the plot of land to which he claimed a statutory title. The bricks were still there, crushed into the ground, and appeared to have been bricks which had been lying about since the demolition of the cottages. They were used merely to make a line and a boundary round the piece of ground which was being worked, without in any way forming any sort of fence. The land had been marked off, not by the defendant but by Haydon, who did it by laying bricks "down "from old cottages," suggesting that the bricks were bricks which had formed part of the old cottages.

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[1] For footnote 1 see p. 159.

For the plaintiffs, their director, one Howey, stated that, so far as they had known, only two of the tenants had cultivated their land, and that they had taken no interest in the property and made no inquiries until 1948. In 1948 the witness Howey had gone onto the land, and measured it with a view to preparing a plan for development. He had not at that date seen any sign of cultivation. Planning permission was on that occasion refused, and the proposed development had to be postponed. No attempt had been made to stop the witness from entering on the land and the plaintiffs had never abandoned possession.

The county court judge, in a reserved judgment delivered on June 28, 1957, found that the plaintiffs had never intended to discontinue their ownership or to allow anyone else to acquire ownership, but that what had been done by Haydon and the defendant was sufficient to amount to actual ousting of the plaintiffs, and that nothing done by the plaintiffs from 1940 onwards amounted to an effective dispossession of the defendant. He held, on the authority of *Marshall* v. *Taylor*,[2] that the defendant had made out his claim to the title of the land in question, the boundaries of which were defined by the bricks; and he granted him a declaration that he was the owner in fee simple of the land.

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[2] [1895] 1 Ch. 641.

The plaintiffs appealed.

David Hunter for the plaintiff owners. A claimant, to succeed in establishing a squatter's title under section 5 (1) of the Limitation Act, 1939, must show, for the full 12-year period, four things: (1) that he has been in possession of the land and used it in a manner wholly inconsistent with the user intended by the true owner; (2) that he has been in possession animo possidendi as owner; (3) that his possession has been exclusive of all other persons, and particularly of the owners; and (4) that his exclusive possession extended to all the land which he claims. None of those four elements was properly established by this defendant.

Under (1) the claimant must show both "discontinuance of "possession" by and "dispossession" of the owners, that is, a cesser by the true owner and a taking possession by the claimant. On the "discontinuance" aspect, the planning application of these owners in 1948 and their representative's visits to the land are sufficient to show that they never intended to abandon possession, and the county court judge correctly held that they did not discontinue ownership. As to whether they have been dispossessed against their will, the principle applicable is that laid down in *Leigh* v. *Jack* [3] by Bramwell L.J., namely, that acts of user are not enough to take the soil out of the owners unless they are acts which interfere and are inconsistent with the purpose to which the owners intended to devote it. That principle has often been acted on since. The only user by this defendant was cultivation of the top soil for the whole period, and that user was consistent with the owners' intention to develop when opportunity arose and not to use the land meanwhile. *Marshall* v. *Taylor*,[4] on which the county court judge based his decision, is distinguishable, for there the owner was excluded from the land by a hedge: see *per* Lord Halsbury [5] that he could only get onto it if he crept under the hedge. The present defendant has never effectively excluded either the owners or anyone else from any part of this land.

[HODSON L.J. The fact that these owners have framed their action as one for the recovery of land and say that they have been dispossessed may create difficulties for them under the Act, for such an action could have been brought 12 years ago.]

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[3] (1879) 5 Ex.D. 264, 272.

[4] [1895] 1 Ch. 641.

[5] Ibid. 645.

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That is a matter of form rather than substance. A claim for possession is common form in the county court and avoids the difficulties which arise over enforcing injunctions if the action is framed in trespass only. If necessary, the claim for possession can be abandoned, though in *Leigh* v. *Jack*[6] the court made an order for possession. Under the Act of 1833 then in force, any "possession" sufficed to exclude the owner; but under the present Act of 1939 this claimant must show "adverse possession": see section 10 (1). That represents a tightening of the law in favour of the landlord.

On (2) the claimant must take and retain the land animo possidendi. Acts which are referable to some intention falling short of ownership are not enough to establish a squatter's title. The fact that this defendant thought that he was exercising rights as the tenant of No. 367a is fatal to his claim. In *Convey* v. *Regan*[7] Black J. said that it was not enough to show non-user by the owner, that possession must be exclusive, and that where there is doubt the true owner should get the benefit of the doubt. *Littledale* v. *Liverpool College*,[8] which was concerned with an easement, is authority for the submission that where acts are equivocal the animus possidendi is decisive. *Whitmore* v. *Humphries*[9] sets out a parallel principle in relation to encroachments by a tenant. This defendant was never in adverse possession, for he was never in possession animo possidendi. This claimant did not go onto the land to assert his possession but merely to "dig for victory."

[*Philpot* v. *Bath*[10] and *Duke of Beaufort* v. *John Aird & Co.*[11] were referred to in support of head (4), supra, but the court indicated that in their view the only point of substance was (1) and submissions on (3) and (4) were not developed.]

Raphael Tuck for the defendant. A squatter is entitled to succeed under the Act when, despite the continued ownership by the owners, he continues his possession for the full statutory period. The bricks put down by Haydon are enough to show possession by this defendant, for they defined the limits of the land he intended to possess.

[HODSON L.J. In *Marshall* v. *Taylor*[12] the court was impressed by the hedge. It would follow that the absence of a fence in this case may be important.]

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[6] 5 Ex.D. 264.

[7] [1952] I.R. 56, 58, 60.

[8] [1900] 1 Ch. 19, 21; 16 T.L.R. 44.

[9] (1871) L.R. 7 C.P. 1.

[10] (1904) 20 T.L.R. 589; (1905) 21 T.L.R. 634 (C.A.).

[11] (1904) 20 T.L.R. 602.

[12] [1895] 1 Ch. 641.

The principle stated by Bramwell L.J. in *Leigh* v. *Jack*,[13] on which these owners rely, was, it is submitted, obiter, for Cockburn C.J. and Cotton L.J.[14] based their judgments on their view that the acts of user there did not amount to dispossession, and they made no mention of "acts inconsistent with the owners' "intention." Only in *Convey* v. *Regan*[15] has Bramwell L.J.'s principle been applied. The cases cited on easements and profits à prendre are irrelevant to the present issue.

[SELLERS L.J. In *Leigh* v. *Jack* Cotton L.J.[16] said that one must have regard to the nature of the property. A man who owns land which is good for nothing but building on at some future date would not be expected to show active signs of possession throughout the statutory period. He has his legal right. Surely he cannot be dispossessed by someone who uses the land and does no harm at all, simply because he does not perform positive acts of ownership all the time?]

A squatter's title is only acquired when owners do not bother and allow someone else to use the land. They ought either to turn a trespasser off within the 12 years or make clear that the other person is there only by their leave or licence. These owners took no interest for 17 years. The facts, though not the ratio of the decision of the Court of Appeal, in *Moses* v. *Lovegrove*,[17] are relevant here, for the defendant, who succeeded under the Statute of Limitations in that case, had used the premises as a dwelling-house for 14 years in a manner consistent with the owner's purpose, although he paid no rent.

[SELLERS L.J. If the landlord's purpose was to obtain rent, and he got no rent, surely the tenant's user was inconsistent with the landlord's intended purpose. In any event it was agreed in that case that there had been adverse possession and the case was decided on other grounds.]

It would not have been conceded if Bramwell L.J.'s principle was correct. There was no suggestion of inconsistent purpose; and in any event cultivation of the soil is inconsistent with intention to build on the land.

On animus possidendi, the acts of this defendant cannot be referable to any right other than his own adverse title. Though he did nothing to keep the owners off, they did not come onto the land. There can be no greater act of possession than taking land, cultivating it, erecting sheds on and putting wire round it.

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[13] 5 Ex.D. 264.

[14] Ibid. 271, 274.

[15] [1952] I.R. 56.

[16] 5 Ex.D. 264, 274.

[17] [1952] 2 Q.B. 533; [1952] 1 T.L.R. 1324; [1952] 1 All E.R. 1279.

By 1949 this defendant thought that he had a right to do what he liked with the land and he did it. He intended to possess and is entitled to ownership under the Act.

Hunter in reply. Bramwell L.J.'s principle in *Leigh* v. *Jack* [18] was not obiter, for the report shows that counsel was stopped on that point and it follows that all the members of the court accepted his submission. *Moses* v. *Lovegrove* [19] is irrelevant, for adverse possession was there conceded; and in any event user by a tenant who does not pay rent is wholly inconsistent with the intended tenancy.

Hodson L.J. stated the facts, read the defendant's evidence as set out above, and continued: That was the defendant's evidence, on which he claims to have a title which is conveniently described as a squatter's title. Section 4 (3) of the Limitation Act, 1939, provides: "No action shall be brought by any other "person to recover any land after the expiration of 12 years "from the date on which the right of action accrued to him or, "if it first accrued to some person through whom he claims, to "that person: . . ."

The defendant claims that more than 12 years have elapsed since the right of action accrued to the plaintiffs, that is to say, since 1940, when Haydon first occupied the land.

By section 5 (1): "Where the person bringing an action to "recover land, or some person through whom he claims, has "been in possession thereof, and has while entitled thereto been "dispossessed or discontinued his possession, the right of action "shall be deemed to have accrued on the date of the dispossession or discontinuance." Section 10 (1) provides: "No right "of action to recover land shall be deemed to accrue unless the "land is in the possession of some person in whose favour the "period of limitation can run (hereafter in this section referred "to as 'adverse possession') and where under the foregoing "provisions of this Act any such right of action is deemed to "accrue on a certain date and no person is in adverse possession "on that date, the right of action shall not be deemed to accrue "unless and until adverse possession is taken of the land."

I refer to section 10 because the word "'adverse' possession" is there used. That word had not appeared in the earlier Limitation Act which has been considered in earlier authorities.

The first question which arises is whether the plaintiffs had, in the language of the statute, "discontinued [their] possession," and that question was answered by the county court judge in favour of the plaintiffs. He said: "I am satisfied that they "never intended to discontinue their ownership or to allow "anyone else to acquire ownership." In my view the evidence justified that finding that there was never any intention on the part of the plaintiffs to discontinue their ownership. Indeed, they were doing all that they could do in the circumstances, being landlords who intended to use the land for no other purpose than to develop it, and who have been prevented by circumstances hitherto from so doing.

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[18] 5 Ex.D. 264, 272.

[19] [1952] 2 Q.B. 533.

However, the second question, on which the defendant succeeded in the court below, depends on whether they had been dispossessed by the action of the defendant, and that question was answered in favour of the defendant in these words: "In "my view what was done by Haydon and the defendant was "quite sufficient to amount to actual ousting of the plaintiffs." The question on this appeal is whether there was evidence on which the judge could so find.

In my view, the evidence of the defendant which I have read, and which was substantially the evidence in this case on which the county court judge acted, was not, with all respect to him, sufficient; and, indeed, there was no evidence on which he could properly find that the defendant had dispossessed the plaintiffs.

The authorities on this matter go back to a period long before the present Limitation Act, and the first to which I refer is a decision of the Court of Appeal, *Leigh* v. *Jack*.[1] The words which were considered there were those of the Act of 3 & 4 Will. 4. The headnote reads [1]: "Acts of user committed upon "land, which do not interfere and are consistent with the purpose "to which the owner intends to devote it, do not amount to a "'dispossession' of him, and are not evidence of 'discontinuance "'of possession' by him within the meaning of" the Act.

I need not go through the whole of the facts of that case. The plaintiff was the owner of the land, and the defendant had become, at the material time, the owner of land on each side of the land in dispute, the land in dispute being Grundy Street and Napier Place, names used to describe certain portions of waste land which belonged to J. S. Leigh, who was the predecessor of the plaintiff. What had happened, stated shortly, was that the defendant, who had occupied the land on each side of this piece of ground, had enclosed the piece of ground and placed on it a quantity of old graving dock materials, screw propellers and boilers, and refuse from his foundry. He had spread this stuff over the surface of Grundy Street so as to make the place impassable for carts and horses, although people did occasionally pass on foot, until the place was fully enclosed. The only intention which the owner had referable to that piece of ground was that it should be used as a road. It was never dedicated to the public as a highway.

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[1] (1879) 5 Ex.D. 264.

The argument, so far as it is material to this part of the case, was stated in this way by counsel for the plaintiff [2]: "The "second question depends upon the facts stated in the special "case, and from these it is clear that the plaintiff and her "predecessors in title have not been out of possession for the "period of 20 years. The acts of the defendants were consistent "with the intention of J. S. Leigh, namely, that the soil of "Grundy Street should be at some time dedicated to the public "as a highway; the defendant only used the land until that "intention could be carried out." According to the report he was then stopped, and that argument was accepted by the court, consisting of Cockburn C.J., Bramwell and Cotton L.JJ.

Cockburn C.J. said [3]: "I do not think that any of the defen"dant's acts were done with the view of defeating the purpose "of the parties to the conveyances; his acts were those of a man "who did not intend to be a trespasser, or to infringe upon "another's right. The defendant simply used the land until the "time should come for carrying out the object originally contem"plated. If a man does not use his land, either by himself or "by some person claiming through him, he does not necessarily "discontinue possession of it. I think that the title of the "plaintiff is not barred by the Statute of Limitations."

Bramwell L.J. said that two things appeared to be contemplated by the statute in question: dispossession and discontinuance of possession. He went on [4]: "I think that . . . the "circumstance that J. S. Leigh within 20 years before suit "repaired the fence separating Grundy Street from Regent Road "is strong to show that there was no discontinuance." He then dealt with the question of dispossession and said [4]: "I do "not think that there was any dispossession of the plaintiff by "the acts of the defendant: acts of user are not enough to take "the soil out of the plaintiff and her predecessors in title and to "vest it in the defendant; in order to defeat a title by dis"possessing the former owner, acts must be done which are

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[2] 5 Ex.D. 264, 269–270.

[3] Ibid. 271.

[4] Ibid. 273.

"inconsistent with his enjoyment of the soil for the purposes for which he intended to use it; that is not the case here, where the intention of the plaintiff and her predecessors in title was not either to build upon or to cultivate the land, but to devote it at some future time to public purposes."

Cotton L.J. dealt with the matter thus[5]: "In deciding whether there has been a discontinuance of possession the nature of the property must be looked at. I am of opinion that there can be no discontinuance by absence of use and enjoyment where the land is not capable of use and enjoyment. In the present case the property sought to be recovered is a piece of land intended to be dedicated to the public as a road. At one end of it was a fence consisting of a post and rails; within 20 years before action this fence was repaired by J. S. Leigh; this was a user of it sufficient to defeat the operation of the Statute of Limitations. Even if the acts of the defendant could be held to amount to an ouster of the plaintiff and her predecessors in title, there has been a possession by them of the soil of Grundy Street and Napier Place within 20 years." So Cotton L.J. laid emphasis on the nature of the property to be looked at in the particular case. I think, for my part, that all their Lordships were in agreement in the way in which they dealt with the matter, and that there really is no substance in the argument, put forward on behalf of the defendant here by Mr. Tuck, that Bramwell L.J. was striking out on his own, unsupported by the other members of the court, when he spoke of acts having to be done inconsistent with the enjoyment of the soil for the purposes for which the plaintiff intended to use it.

Applying that test to this case, I cannot see that any act which the defendant did is capable of being treated as sufficient to dispossess the plaintiffs. The defendant never even thought he was dispossessing the plaintiffs; he never claimed to do more than work the soil, as he thought he was permitted to do. He had some vague idea in his head, derived from a source which is not clear on the evidence, that it was quite all right for him to work it; but he never, so far as I know, had any intention, nor claimed any intention, of asserting any right to the possession of this piece of ground.

I would have left the matter there had not the county court judge founded himself on another case which he thought supported the view which he came to. It is *Marshall* v. *Taylor*,[6] where the plaintiff and the defendant were owners of adjacent houses and adjacent gardens, which were formerly separated by an open ditch, on the plaintiff's side of which was a hedge. *Leigh* v. *Jack* [7] was distinguished on the facts, but it seems to me that the facts of that particular case were so different from this case that there was no reason really why the county court judge should have been deflected from the prima facie view which he might have adopted if he had only referred to *Leigh* v. *Jack*.[7]

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[5] 5 Ex.D. 264, 274.

[6] [1895] 1 Ch. 641.

Perhaps I should read the headnote, although it concerns matters which have very little to do with this case [8]: "More "than 12 years before the action was brought the defendant "paved part of the surface with cobblestones and laid cinders "on part, and also planted a rose-garden and made a fowl-house "on other parts. But the plaintiff continued to cut his hedge "from the defendant's side, and on two occasions opened the "ditch to clean out the drains:—*Held*, . . . that, assuming that "the plaintiff was the original owner of the ditch, he had lost "the ownership of the surface by lapse of time, the acts of "ownership of the defendant having been sufficient to dispossess "him within the meaning of the 3rd section of 3 & 4 Will. 4, "c. 27."

I think it is sufficient, to distinguish this case, to point out that in that case the defendant had completely enclosed the property in question by a hedge and made it entirely part of his garden, which was a property of the same kind and of the same nature as the garden of the plaintiff alongside. The plaintiff was excluded from access to the defendant's garden unless he had chosen, as Lord Halsbury pointed out,[9] to creep through the hedge; whereas in this case there was nothing of that kind. No attempt was made by the defendant here to fence off his piece of ground so as to exclude anyone from it; all he did was to work the ground in the period before the sheds were built, and in 1949, within the 12-year period, he put up these sheds which have been, in the end, the reason why this action has been brought.

I think that if the plaintiffs desire an order for possession in accordance with the precedent of *Leigh* v. *Jack* [10] they are entitled to it, although it would seem to be unnecessary. What they really require is an order for the pulling down of the sheds, and damages, which in my judgment should be nominal, for the trespass. Those damages will be 40s.

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[7] 5 Ex.D. 264.
[8] [1895] 1 Ch. 641.
[9] Ibid. 645.
[10] 5 Ex.D. 264.

To that extent I think the appeal should be allowed.

MORRIS L.J. I am of the same opinion. When the plaintiffs brought their action they were met by the defence that the claim had not been brought until after the expiration of 12 years from the date on which the right of action accrued to them. It is necessary to have the provisions of section 5 (1) in mind. The plaintiffs had been in possession of the property and the question arose whether they had been dispossessed or had discontinued their possession. Under section 5 (1) a right of action is deemed to have accrued on the date of any dispossession or discontinuance.

Two questions therefore arose: first, had there been discontinuance by the plaintiffs, and secondly, had there been dispossession of the plaintiffs by the defendant? The first of those questions has presented no difficulty. It was pointed out by Bramwell L.J., in his judgment in *Leigh* v. *Jack*,[11] that the smallest act is sufficient to show that there is no discontinuance. He said that in dealing with a house it would perhaps be difficult to suppose a case where it could be doubtful whether there had been a discontinuance of possession, but he said that it was possible to conceive of a case of discontinuance of possession as to a piece of land; he went on to point out that in such a case the smallest act would be sufficient to show that there was no discontinuance.

In the present case the plaintiffs had wished to develop the land. In 1948 their representative, Howey, had twice gone on the land and had measured it, and application was presented for permission to build on the land. Later, in 1953, the plaintiffs actually dumped some material, some rubbish, on the land, which they were saying was their land. It seems to me that those acts would be sufficient to indicate that there was no discontinuance of possession by the plaintiffs.

The real question that has been debated is whether, on the facts as they are found and known, there was dispossession of the plaintiffs by the defendant. The plaintiffs had bought the property in 1937. They had taken down some old cottages and built the premises which are now numbered 365 to 375. But the land at the back was left vacant. It was found by the judge that they intended to develop that land when an opportunity arose, and until that opportunity arose they did not, in the meantime, intend to use it. The war came and there were the great difficulties of building on the land. So it came about that the land at the back of these premises was used for purposes of growing garden produce. One Haydon in fact used the land at the back of the property No. 367. He began to use it in 1940. It is perhaps not uninteresting to see how he himself put it. He said that he did not think that he was trying to take possession but he was merely using the land while the emergency was on. He called it a "part of the war effort." Some bricks were put down which he described as being simply a dividing mark. All that, I think, shows the nature of what was happening. Similar evidence was given by a lady, Mrs. Wolcha, the mother-in-law of the defendant. She was in flat No. 365, and she said: "I did "not regard it as my own land." She was speaking with reference to a corresponding user. She said her husband worked part and Haydon worked part; "we just took it and used it."

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[11] 5 Ex.D. 264, 272.

I think that those facts are all material, because in considering this question of whether there was dispossession it is of importance to have in mind what Cotton L.J. said in *Leigh* v. *Jack*[12]: "In deciding whether there has been a discontinuance of posses-"sion the nature of the property must be looked at." Here, therefore, was property which, after 1937, was waiting to be developed. The plaintiffs wanted to build on it when they could, but did not intend to use it meanwhile. Then by reason of the coming of the war and the desire of people to use any land, the land was used by the tenants of various properties in order to grow things thereon.

Howey said that if he had been asked by the tenant of No. 367a for permission he would have given it, but he would have called for some record. It seems to me that the evidence shows that there was mere user of this land, but not user amounting to dispossession of the owners of it. The defendant said himself that he had done nothing to keep the plaintiffs off the land, and he said there was practically no fence there now. The defendant cultivated until 1948 or the beginning of 1949, and then, in 1949, put the wire round the part where he was keeping greyhounds and some sort of shelter or shed.

When Howey went on the land in 1948 there was no let or hindrance at all. He was able to go on the land. He went on the land with an official. He was seen by someone to go on the land. No fence of any kind stopped him. He took measurements, he prepared a plan of the proposed development, and we have seen a document showing that he applied to build on the land.

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[12] 5 Ex.D. 264, 272, 274.

I have mentioned the occasion in 1953 when there was some dumping of rubbish by the plaintiffs on the land. There was then a conversation between Howey and the defendant. There is no doubt that the gist of the conversation was that on a protest from the defendant Howey said that the defendant really had some "cheek" in suggesting what the plaintiffs were to do with their own land. When Howey went on the land in 1953 he saw a shed, but he did not think it was on the plaintiffs' land: he formed the impression that it was not: and he did not see the greyhounds. No attempt was ever made to stop Howey going onto the land.

In all the circumstances it seems to me that the cumulative effect of the evidence is to make it quite impossible to say that there was actual possession in the defendant of a nature that ousted the plaintiffs from possession, or excluded them from possession: there was no intention on the plaintiffs' part to do other than keep the land until they could use it, and in those circumstances such measure of user as took place was not of a nature or quality, in my judgment, which could amount to an ouster by the defendant of the plaintiffs from their possession. I therefore think that the appeal should be allowed.

SELLERS L.J. I agree. The land in question was idle. Its owners were waiting for an opportunity to build on it. There are, unhappily, in our country, many vacant plots of land due to enemy bombing which, for economic and planning reasons, have not yet been, and cannot yet be, built upon. The true owners can, in the circumstances, make no immediate use of the land, and as the years go by I cannot accept that they would lose their rights as owners merely by reason of trivial acts of trespass or user which in no way would interfere with a contemplated subsequent user. I am glad to think that this appeal must be allowed.

Appeal allowed with costs in the Court of Appeal and below.
Order granted for removal of fencing and sheds.
Damages 40s.

Solicitors: *H. B. Wedlake, Saint & Co.; Alfred Slater & Co.*

M. M. H.

C. A.

1957
Oct. 14, 15.

Lord Evershed M.R., Romer and Ormerod L.JJ.

PAYNE *v.* COOPER.

[Plaint No. N. 31.]

Landlord and Tenant — Rent restriction — Possession application—Arrears of rent—Absolute order for possession against statutory tenant — Payment of arrears into court before order executed — Application by occupier to vary order—Order providing for discharge on compliance with conditions — Jurisdiction of court to discharge absolute order by interposing conditional order—Form of order—Whether further order to be made after conditions complied with—Rent and Mortgage Interest Restrictions Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 4 (2)

Landlord and Tenant—Rent restriction—Statutory tenant—Nature of interest after absolute order for possession made but not executed.

County Court—Practice—County court rules—Form 138.

On January 7, 1957, the landlord of premises within the Rent Acts and let at a weekly rent of 14s. issued proceedings against the statutory tenant, claiming possession on the ground of non-payment of rent. On February 13, the deputy county court judge ordered the tenant to deliver up possession in 28 days. On the last day of grace the tenant paid the arrears of rent to that date into court and applied to have the order for possession suspended. A week later he paid the taxed costs of the action and the county court judge postponed the issue of the warrant for one month by consent. A further application for suspension having been made, on May 6 the judge made an order postponing possession for 28 days from that date " on condition that on or before that date" (i.e., the date of expiration of the 28 days) " [the tenant] shall " pay or shall have paid the arrears of £23 16s. together with the " other arrears accruing to today and the costs of the hearing on " February 13, 1957, and the costs of today assessed at £2 2s. and " on such payment the order for possession shall be discharged." The landlord contended on appeal that, as the original order of February 13 was unconditional and final, the county court judge had no jurisdiction to make the order of May 6:—

Held, (1) that section 4 (2) of the Rent and Mortgage Interest Restrictions Act, 1923,[1] empowers the court in a case where an order for delivery up of possession on a fixed date has been made but not executed to make an order postponing the date of possession on conditions, and, if the conditions are performed, the court has power to discharge the order.

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[1] Rent and Mortgage Interest Restrictions Act, 1923, s. 4: " (2) At " the time of the application for or " the making or giving of any order " or judgment for the recovery of possession of any such dwelling-house, " or for the ejectment of a tenant " therefrom, or in the case of any " such order or judgment which has " been made or given, whether before " or after the passing of this Act, and " not executed at any subsequent " time, the court may adjourn the " application, or stay or suspend " execution on any such order or " judgment, or postpone the date of " possession for such period or periods " as it thinks fit, and subject to such " conditions (if any) in regard to payment by the tenant of arrears of " rent, rent, or mesne profits and " otherwise as the court thinks fit, " and, if such conditions are complied with, the court may, if it " thinks fit, discharge or rescind any " such order or judgment."

Observations in *American Economic Laundry* v. *Little* [1951] 1 K.B. 400; [1950] 2 All E.R. 1186; 66 T.L.R. (Pt. 2) 1080, *Mills* v. *Allen* [1953] 2 Q.B. 341; [1953] 2 All E.R. 534 and *Haymills Houses Ltd.* v. *Blake* [1955] 1 W.L.R. 237; [1955] 1 All E.R. 592 applied.

(2) That the form of order made was within the power conferred by section 4 (2) and it was not necessary that the final discharge should be separately ordered after the conditions had been complied with.

Observation in *Sherrin* v. *Brand* [1956] 1 Q.B. 403; [1956] 1 All E.R. 194 applied.

(3) That on the discharge of the order for possession the tenant would be a statutory tenant.

APPEAL from Judge Baxter, sitting at Brentford County Court.

On January 7, 1957, Miss Ellen Payne (hereinafter called "the landlord"), suing as the personal representative of two deceased persons the owners of premises known as "The Elms," Ruislip Road, Northolt, Middlesex, which were within the scope of the Rent Acts, brought proceedings against Edwin Cooper, the occupier of the premises. The premises had originally been let to the occupier at a weekly rent of 14s., but his tenancy had been determined in February, 1956, and at the time the action began he was a statutory tenant. The landlord claimed arrears of rent amounting to £23 16s. On February 13, Deputy Judge Spicer ordered the occupier to deliver up possession in 28 days; that is, on March 13. On that date the occupier paid the arrears of rent into court. The costs of the action were taxed at £13 14s. 6d., and on March 20 the occupier paid them. On the same day he applied to have the order for possession suspended, and by consent the county court judge postponed the issue of a warrant for one month. On April 15, the occupier applied to have the order for possession suspended or varied or discharged. On May 6, the county court judge made an order postponing the date for possession for 28 days from that date "on condition "that on or before that date the [occupier] shall pay or shall "have paid the arrears of £23 16s. together with the other "arrears accruing to today and the costs of the hearing "on February 13, 1957, and the costs of today assessed at "£2 2s. and on such payment the order for possession shall be "discharged."

The landlord appealed, contending that as the original order of February 13 was unconditional and final, the court had no jurisdiction to make the order of May 6.

Roy Dunn for the landlord. The issue is as to the true construction of section 4 (2) of the Act of 1923. The court would not lightly adopt a construction empowering the discharge of an absolute order made by a court of competent jurisdiction. The language would have to be clear and unequivocal. *Kelly* v. *White*[2] shows what the law was immediately before the subsection was originally passed in 1920 (it was re-enacted in 1923); the question is whether it has now been altered by the subsection.

Once an absolute (as distinct from a conditional) order for possession has been made against a statutory tenant, the statutory tenancy no longer exists and cannot be revived, for, as *J. M. Brown Ltd.* v. *Bestwick*[3] shows, there must be a nexus between the determination of a contractual tenancy and a statutory tenancy. Here the statutory protection of the occupier has gone (see *Brown* v. *Draper*[4]), with the sole exception that he still has the right in the interim between the making of the order and its execution to apply to the court to have the order suspended, but that, as Jenkins L.J. said in *American Economic Laundry* v. *Little*,[5] is not a statutory tenancy for all purposes.

There is no copy of the actual order made in this case, but it must have been a final or absolute order.

[*Bach*, intervening. It is conceded that it was an order to give up possession on a specific day.]

There is no case directly in point. In *Yates* v. *Morris*[6] the original order was not an absolute or final one. *American Economic Laundry* v. *Little*[7] was concerned with a different question, but the reasoning is helpful and supports the submission as to the effect of making an absolute order. Jenkins L.J. referred[8] to the indulgence afforded to the occupier after an order has been made as a "period of grace," an expression which, it is submitted, does not suggest complete discharge but only limited suspension. In *Mills* v. *Allen*[9] Birkett L.J. dealt with the distinction between absolute and conditional orders. [Reference was also made to *Goldthorpe* v. *Bain* [10] and to the comments in Megarry on the Rent Acts, 8th ed. (1955), p. 236, n. 85.] *Haymills Houses Ltd.* v. *Blake* [11] is distinguishable, for there the original order was conditional, but there is, admittedly, an observation of Evershed M.R.[12] which is against the submission on behalf of the landlord here. *Sherrin* v. *Brand* [13] was also a case of a conditional order.

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[2] [1920] W.N. 220.

[3] [1951] 1 K.B. 21; 66 T.L.R. (Pt. 2) 248; [1950] 2 All E.R. 338.

[4] [1944] K.B. 309; 60 T.L.R. 219; [1944] 1 All E.R. 246.

[5] [1951] 1 K.B. 400, 407; 66 T.L.R. (Pt. 2) 1080; [1950] 2 All E.R. 1186.

[6] [1951] 1 K.B. 77; 66 T.L.R. (Pt. 2) 707; [1950] 2 All E.R. 577.

[7] [1951] 1 K.B. 400.

[8] Ibid. 407.

[9] [1953] 2 Q.B. 341, 361; [1953] 2 All E.R. 534.

The right to ask for suspension of the order is not attached to a statutory tenancy for all purposes; it cannot be transmitted, for example, under section 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. There may be special cases of suspension by consent where the court is able to find indications that some sort of tenancy still exists—where, for example, rent has been accepted after the order has been made. But that is not so in this case. No rent was accepted. The order made by the judge was intended to evict the tenant; it was not designed to put the court's sanction on the tenant abiding by the conditions and doing what the court intended. If the tenant had died during the period of suspension, there was no right which could have been transmitted under section 12 (1) (*g*).

If Parliament had intended to give the court power to discharge an absolute order specific and clear language would have been used. Any "such order" refers to any such conditional order. It is not clear what was the exact form of the original order in the *American Economic Laundry* case [14]; it looks as though it was absolute, and, if so, that is the only reported case in which an absolute order for possession has been subsequently "watered down" by order of the court. But even in that case the absolute order was not transformed into a conditional order; it was only suspended. There appears to have been some provision for suspension in the original order and subsequently a further extension was granted.

Bach for the occupier. The authorities are not of any real assistance. The courts were considering the consequences ensuing on the making of an order, not what were the powers conferred by section 4 (2). The *American Economic Laundry* case,[14] *Mills* v. *Allen* [15] and *Sherrin* v. *Brand* [16] were all cases where the Court of Appeal was considering the effect of an order where the tenant against whom the order was made had died before it had been executed. The *Haymills* case [17] was, admittedly, concerned not so much with the consequences of an order as with its nature, whether it was absolute or conditional. There is no authority directly decisive of the question at issue though there are helpful observations: see *per* Evershed M.R. in *Mills* v. *Allen* [18] that an absolute order may be converted to a conditional one and that thereafter it may be discharged, and there is nothing unreasonable or contrary to the general policy of the Acts so to construe the subsection. See also the *Haymills* case.[19] The section should be construed according to the plain meaning of the language used. The wider interpretation is more in conformity with the policy of the Acts. There is nothing in the subsection which prevents the judge from making this type of order. All the stages taken are within the provisions of the subsection; there had been an order made and not executed; the court then had power to suspend execution or to postpone the date for possession, and the postponement could be for such a period and subject to such conditions as the judge thought fit. Once the conditions were fulfilled, the language of the subsection flows on naturally to empower the court, if it thinks fit, to rescind or discharge " any such order," which links up with " order " in every other part of the subsection. The order made in this case follows the usual form—Form 138 in the County Court Practice, 1957, p. 617, introduced in 1950. It was within the powers conferred by section 4 (2) to make one compendious order—there was no need for a separate order of discharge after the conditions had been fulfilled.

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[10] [1952] 2 Q.B. 455; [1952] 1 T.L.R. 1512; [1952] 2 All E.R. 23.

[11] [1955] 1 W.L.R. 237; [1955] 1 All E.R. 592.

[12] Ibid. 239.

[13] [1956] 1 Q.B. 403; [1956] 1 All E.R. 194.

[14] [1951] 1 K.B. 400.

[15] [1953] 2 Q.B. 341.

[16] [1956] 1 Q.B. 403.

[ROMER L.J. Form 138 was considered in *Sherrin* v. *Brand*,[20] and it does not seem that any of the members of the court then thought that it was bad. It was said to be within section 4 (2).]

There is nothing in the form of the order or the phraseology which is contradictory to or alien to the language of section 4 (2). The judge has followed the language of that section very closely. Evershed M.R. seems to have adopted the same line of reasoning in the *Haymills* case.[21]

[He was stopped.]

Dunn in reply. The court did not take the view in the *Haymills* case [21] that if the order was otherwise effective, a conditional discharge must be taken to be within the section. The county court form does not discharge the order. It merely provides that it shall not be enforced if the conditions are complied with. The power of discharge, if it exists at all, does not arise until the conditions attached to the order have been complied with.

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[17] [1955] 1 W.L.R. 237.
[18] [1953] 2 Q.B. 341, 354.
[19] [1955] 1 W.L.R. 237, 248.
[20] [1956] 1 Q.B. 403, 428.
[21] [1955] 1 W.L.R. 237.

LORD EVERSHED M.R. (after stating the facts): It is plain enough that the county court judge took in May a much more favourable view of the occupier than had the deputy county court judge in February. In the course of his judgment the judge stated in terms that he wished to exercise all available powers to allow the occupier to remain in possession provided that he paid rent; and that view seems to have been based in part upon his age—the occupier is 78—and also perhaps upon the fact that he is a keen gardener, and the county court judge may have thought of the famous essay of Sir Francis Bacon [" Of " Gardens," Bacon's Works, Spedding ed., 1858, Vol. 6, p. 485.] But we are not concerned with the reasons. No question of that kind has come before us. The only matter which we must decide is that of the jurisdiction of the judge to make the order which he made on May 6; for it is Mr. Dunn's contention that it was ultra vires the subsection invoked.

On a previous occasion I am reported as having said that the language of this subsection [section 4 (2) of the Rent and Mortgage Interest Restrictions Act, 1923] is somewhat inelegant, and I find no reason to repent of that criticism. It may be that, as is not uncommon in this sort of legislation, Parliament sought, so to say, to take into the scope of this subsection a number of different conceptions, so that the result requires a little careful thought, to put it no higher. The subsection supersedes and re-enacts section 5 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

[His Lordship read section 4 (2) of the Act of 1923 and continued:] It is possible for present purposes somewhat to simplify that language, for the first three lines are concerned with powers given to the court at the time when the order for possession is made; and for present purposes we can exclude them from consideration. I will, however, read again such of the following language as I think is relevant, and my omissions will not in any way, in my judgment, invalidate the conclusions on construction which I eventually reach. " In the case of any " order for the recovery of possession of a dwelling-house which " has been made and not executed the court may suspend "execution or postpone the date of possession for such period "as it thinks fit, and subject to such conditions as the court "thinks fit, and, if such conditions are complied with, the court "may discharge such order." That reading (if it is, as I hope, justified) starts with the required premise that there should have been an order under the Act for possession of a rent-controlled dwelling-house not executed. That premise is satisfied in this case. There had been on February 13, 1957, an order for possession, and it had not been executed.

That being so, at first sight it would appear to me that inevitably the section gives to the court first a power at some later date, on application, to suspend execution; second, a power to postpone the date of possession which the first order contains; third, in the latter event at any rate, a power to impose conditions for the postponement of possession as the court thinks fit; and finally, a power (if those conditions so imposed are complied with) to discharge the original order. To dispose at once of one point, the last five words of the subsection, "any such "order or judgment," make it, as it seems to me, impossible to say other than that the order which may be discharged includes (or may include) the original order for possession, the making of which gave rise to the subsequent exercise of the powers.

Mr. Dunn, it appears to me, has been faced with this difficulty. Once it has to be conceded that the first step—the first of the powers I have enumerated—is available, it becomes to my mind really impossible for him thereafter to stop. If it is right, in other words, that in the case of an order for possession which has been made and not executed, the court may upon later application suspend execution or postpone the date of possession, it seems to me that an inevitable step has been taken which leads inexorably to the final conclusion that all the other steps, all the other alternatives, are equally available. I, of course, fully agree that apart from that subsection it may well be that by the ordinary law, if a court has made an order for possession to take effect without qualification on a particular date, it would not be competent for the court thereafter to interfere with that order; and it would also not be competent for it to make an order for possession, coupled with some indefinite term of postponement. But we are dealing here with the specific provisions of this legislation; and at first sight, as a matter of construction of the subsection, the conclusion appears to me to be involved necessarily from the language that, given an order for possession made but not executed, the court may by subsequent order postpone the fixed date on conditions, and thereafter may provide for the discharge of the order if the conditions are satisfied. In using the word "thereafter" I must not be taken to be indicating that a further order is required, though that is a matter which I must deal with later in this judgment.

The effect, if that view is right, undoubtedly is that by exercising its powers the court may convert what originally was, to use the same language already used, an absolute or final order into a conditional one; and I agree that on the terms of this section Parliament has provided in its wisdom that the court may discharge an order which is conditional on satisfaction of the condition, but has made no provision for the discharge of an absolute order as such.

The question which we are now called upon to decide has not so far directly been the subject of a decision; but as Mr. Dunn pointed out, the matter has been debated somewhat in the course of judgments recently before the court under the Act, where the question not uncommonly, though not invariably, has been whether a member of the family of a tenant or an ex-tenant, against whom a possession order has been made, is a person who otherwise might qualify under the terms of section 12 (1) (*g*) of the Act of 1920. Does such a person become entitled to succeed to the tenant's occupancy? I am not going to refer to all the cases, but the first case to which I wish to refer when that precise point arose was *American Economic Laundry* v. *Little*,[1] which came before the Court of Appeal consisting of Somervell, Jenkins and Birkett L.JJ. In that case what I have called (and it will be a sufficient definition) an absolute order for possession had been made against a tenant. He had been ordered, that is to say, to give up possession on or before a specified date unconditionally, but owing to illness or other circumstances, applications had been made as a result of which the date for giving up possession had been postponed; and when this matter came before the court, the date had become finally fixed as April 3, 1950. Before April 3, 1950, arrived, however, the tenant died, and the question was whether his daughter, who had lived with him for 12 years on the premises, could claim to occupy as a statutory tenant of the premises; and this court answered that question in the negative. The conclusion was put by Somervell L.J. on the ground that the order for possession, being in that absolute and final or unconditional form, operated to put an end altogether to any rights under the statute which the tenant had, at any rate on the date when

[1] [1951] 1 K.B. 400; [1950] 2 All E.R. 1186; 66 T.L.R. (Pt. 2) 1080.

the order by its terms took actual effect, and there was nothing left to which the daughter could succeed.

Jenkins L.J. put his reasons on slightly different grounds. He did not go so far as to say that the order had destroyed the statutory rights of occupancy altogether. He put it on the ground that the daughter, if she could succeed at all, must succeed cum onere; she could take only whatever was remaining to her father when he died, and that for actual purposes was nothing at all, and at the date when the application came before the court was in truth nothing.

But before I leave the case it is, I think, important to make two observations. The first is that Somervell L.J. at the end of his judgment made it clear that the view he had taken of the destructive effect quoad the tenant's rights of the order for possession was not necessarily applicable in a case where the order for possession was conditional; and from that passage in the judgment the distinction between absolute and conditional orders may have taken rise. It was a case, I may say, in which the respondent tenant was not represented by counsel; and counsel who appeared for the appellant landlord had the always slightly difficult task of putting arguments against himself. It was in reference to those arguments which Mr. MacDermot put that Somervell L.J. said [2]: "The difference between those two "kinds of order"—that is, absolute and conditional—"is illus-"trated by these concluding words of the subsection: 'if such "'conditions,' that is to say, conditions to which an order is "made subject, 'are complied with, the court may, if it thinks "'fit, discharge' the order. That cannot be done when an "absolute order has been made; it can only be done if the order "is made conditional." But in my opinion the Lord Justice was not laying down or purporting to lay down the proposition that if an absolute order had been made, nothing thereafter could alter its character—in particular that it could not be converted into a conditional order. That question was not before him, and indeed, had it been, I think the Lord Justice would certainly have qualified his language, which brings me to the second matter I want to mention.

I have said that since the original order had been made, further orders suspending execution had been superimposed upon it. The validity of those later orders was not in terms discussed, but quite plainly their validity was accepted, not only by Mr. MacDermot as counsel, but clearly also by the Lords Justices who took part in the decision of that case. Nobody questioned that under the terms of the subsection the suspensions had been validly made, from which, of course, it follows inevitably that what I have called the first step under this subsection must be treated in any case as available—the step, after an absolute order for possession, of later suspending its execution.

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[2] [1951] 1 K.B. 400, 406.

The other two cases which upon this point I think I should mention are both cases in which I myself took part, and from which citations have been made. The first was *Mills* v. *Allen*,[3] which was a case very special in its own facts. Orders had been made, not under the Rent Acts, but under the Small Tenements Recovery Act, 1838, and a warrant for executing the order for possession had been issued, but not acted upon. The main question was whether those orders had lapsed; but in the course of the case the question arose, supposing that they had, what were the rights, existing or reviving, of the tenant? It was, therefore, relevant to consider whether the making of an order for possession had the necessary effect of putting an end to all statutory rights. In that connexion reference was made to the *American Economic Laundry* case,[4] and in the course of my judgment I said[5]: "I "venture to indicate some difficulties in the way of what may "appear at first sight perhaps to be the commonsense view of "the so-called conditional form of order when the present problem "arises (as it is apt to do though it may not frequently do so), "on the death of the tenant leaving somebody who claims the "benefit of the definition section. I begin by observing that "though the original order be absolute, nevertheless as I read "section 4 (2) of the Act of 1923, it may not only be discharged "on application, but it may, in effect, be converted thereafter "into a conditional order, for the language at the end of the "subsection seems to contemplate that possibility." If I meant by that language to indicate that an absolute order might be discharged without more upon some later application, I think it is not right, and indeed I qualified it in the later case. But at any rate, though not purporting to decide the point, I did there express the view (and Birkett and Romer L.JJ., who were sitting with me, in no way dissented from it) that the terms of section 4 (2) comprehended the power to superimpose on an absolute order an order postponing possession on condition—in other words, power to convert an absolute order into a conditional order, with

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[3] [1953] 2 Q.B. 341; [1953] 2 All E.R. 534.

[4] [1951] 1 K.B. 400.

[5] [1953] 2 Q.B. 341, 354.

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the consequence that the order, if the conditions were satisfied, could then be discharged.

The second case in which I also expressed views on this matter is *Haymills Houses Ltd.* v. *Blake.*[6] That again was a case which mainly turned upon other questions, but I referred [7] to what I had said in *Mills* v. *Allen*,[8] and proceeded [9]: "That "general observation may now require to be a little expounded" —that is, the observation which I have already cited. "I still "think it may well be that if an absolute order for possession "is made, then, when it is not yet executed, the court may under "the section make an order postponing the date of possession "on conditions, and, if it did that, then, if the conditions were "performed, it may well be that the final words of the subsection "would give power to discharge the original order, even though "absolute in form. If that is right, then it would justify the "language I there used: that an absolute order may be in effect "converted into a conditional one, so as to give rise to the power "of discharge. But I am not saying anything which would "conflict with Somervell L.J.'s expression of opinion that an "absolute order, as such, would not be liable to be discharged "under the powers of the final terms of the subsection; I prefer "not to express further than I have already tried to intimate "conclusions as to the general operation of this section, but to "confine myself, for the present at any rate, to the particular "facts of this particular case, which is one in which there followed "one after the other, as I understand them, two so-called con- "ditional orders." Again my brothers in the court in the *Haymills* case,[10] who were Jenkins and Morris L.JJ., agreed with what I had said, adding nothing of their own. There has been, so far as is known, no adverse comment or no contrary opinion expressed in any other case in this court; and therefore it seems to me that the view which was there intimated is one which should now be taken as acceptable; and it obviously supports the view of the construction of the subsection which I have already indicated.

Finding nothing which prevents the language having ordinary effect, it appears to me, therefore, to follow—now that the matter is directly before us for consideration—that it is within the competence of the court, when an absolute order (so-called) has been made but not executed, to convert it in effect into a conditional order by the process (Mr. Dunn may call it a "device," but "process" perhaps is a better word) of making a subsequent order postponing the date of possession upon conditions, and thereby inevitably, as I think, giving rise to the power contained in the last two lines of the subsection, upon satisfaction of the conditions, to discharge the original order for possession. I think, therefore, subject to one point which remains (and with which I will shortly deal), that the judge was entitled, as he thought he was, and for the reasons which he stated, to make the order of May 6 which he made.

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[6] [1955] 1 W.L.R. 237; [1955] 1 All E.R. 592.

[7] [1955] 1 W.L.R. 237, 246.

[8] [1953] 2 Q.B. 341.

[9] [1955] 1 W.L.R. 237, 247.

[10] [1955] 1 W.L.R. 237.

The remaining point is one of a strictly technical character, and it may be stated thus. The last two lines of the subsection are: "and if such conditions are complied with, the court may, "if it thinks fit, discharge any such order." As a matter of English, at first sight it might be said with force that it is only when the conditions have been in fact complied with that that power arises, and may be invoked. In the present case it will be recalled that the judge combined all the operations into one order. He added at the end: "and upon such payment"—that is to say, if such payment is made—"then the order for possession "shall be discharged." Mr. Dunn, not unnaturally, has not felt very anxious to press this point because, if it was successful, the only possible consequence would be another application, the result of which would be inevitable, and costs would be expended to no useful purpose; but he has assisted the court by putting the point as I have tried to express it.

Upon a very strict reading of the subsection, there is obviously much to be said for that view. But I think the answer to it is that in practice the sanction of this court must now be taken to have given affirmation to the way in which the judge in this case exercised the power. For the practice I turn to the county court forms, particularly Form 138 [in Appendix A to the County Court Rules, 1936], at page 617 of the County Court Practice, 1957. That form is an order for recovery of a certain sum of money for arrears of rent and judgment for possession not to be enforced for a certain period so long as punctual payment is made. Then at the end of the order we find: "And it is further ordered that "the judgment" (singular or plural) "shall cease to be enforce-"able when the arrears of rent mesne profits and costs referred "to are satisfied." The form is no doubt slightly different from that in the present case, but the substance is the same—that is to say, by this form of order the court is proleptically exercising the power of discharge which the last two lines confer; no

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suggestion has been made of any other source of the power contained in the last line of the order.

That form of order came before the court, not directly upon this point, it is true, but it was considered in the last of the cases which were cited to us of *Sherrin* v. *Brand*,[11] the court consisting of Birkett and Romer L.JJ. and myself. In the judgment of my brother Romer reference is made to this aspect of the order[12]: "In my opinion, the result of these two orders "is to qualify the immediate operation which the preceding "adjudications would otherwise have had by suspending their "enforcement in the manner and upon the terms therein pre-"scribed. An absolute stay was imposed on the judgment for "possession for 28 days. Thereafter the judgment should not "be enforced (which means that it should be unenforceable) so "long as the defendant punctually paid" a certain weekly amount. Then: "By the third and concluding order it was "provided that, on payment of the arrears of rent and costs, the "judgment should cease to be enforceable altogether. In my "opinion, the meaning and effect of this judgment, when taken "as a whole, and especially in view of the concluding paragraph, "is that the defendant might remain on as tenant of the premises "so long as he performed the conditions . . ."

Then passing to the next paragraph[13]: "That being, as I "think, the object and effect of the order, the next question is "whether the judge had power to make it. A sufficient affirma-"tive answer to this question is perhaps afforded by the fact "that the form of order is that which is contained in the "appendix to the rules," and that is a reference to this Form 138. "But, apart altogether from that, it is clear, I think, that "the order is within the authority of section 4 (2) of the Act of "1923." In face of that expression of opinion (and there was no dissent at all from either of my Lords present) it seems to me that it would be an altogether unwarranted technicality to press the strict language of the subsection to a conclusion contrary to that which my brother has expressed, namely, to hold that it is necessary formally to get another order discharging the original order.

No doubt it will be relatively rare, when an absolute order for possession has been made, for another judge then to convert it into something quite different not only in language but intent. The present case is, I think, somewhat exceptional. I have already said that the judge plainly took a somewhat different view of the occupier and his conduct from the view which the deputy judge had taken. I think that the power under this subsection to convert an order made by a competent court into something really different in intent and scope is a power that will naturally be somewhat sparingly exercised. But in this case no point is taken on that matter. The question being strictly and exclusively one of jurisdiction, I have given my reasons for thinking that the county court judge had jurisdiction to make this order, and I, therefore, would dismiss the appeal.

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[11] [1956] 1 Q.B. 403; [1956] 1 All E.R. 194.

[12] [1956] 1 Q.B. 403, 428.

[13] Ibid. 429.

I should add that the effect of discharging the order is, of course, that the occupier's situation is that which it was immediately before the order of February 13, namely, that he is a statutory tenant. I think that must follow and should be stated; and if authority again were needed for that, I would rely upon the language of my brother Romer in *Sherrin* v. *Brand.*[14]

ROMER L.J. I agree. It seems to me clear that the question as to the validity of the order of May 6 against which this appeal has been brought essentially depends upon the meaning and effect to be given to the language of section 4 (2) of the Act of 1923. The Master of the Rolls has analysed that language, and I do not propose to analyse it again. But it is, I think, clear that on analysis one finds that, according to the ordinary language of this subsection, the order which the county court judge made did not go outside the authority conferred by its provisions.

Mr. Dunn sought to escape from that conclusion by, in effect, submitting that the final provision of the subsection authorizing the discharge or rescission of an order applies only to cases where the original order was not absolute, but was in a suspended or conditional form; but I can see no warrant for that view. The language is perfectly general, and is expressed to be applicable to the case of any order for the recovery of possession of a dwelling-house. To cut that down so as to interpret it as referring only to an order which, in its original form, was a conditional one, is to narrow the effect of the language which the legislature has thought proper to use in order to arrive at a result which is inconsistent with the language of the subsection. Although the language has been described as inelegant, which indeed it is, nevertheless, taking the language as I find it, I have no doubt that it fully justified the order which the county court judge made.

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[14] [1956] 1 Q.B. 403.

It is quite true, as Somervell L.J. said in the *American Economic Laundry* case,[15] that the discharge provision at the end of the subsection is applicable only to a conditional order and is not applicable in its terms to an absolute order. But nowhere in his judgment in that case does Somervell L.J. either say or suggest that an original unconditional order cannot subsequently, by virtue of this subsection, be made conditional and then subsequently discharged.

Mr. Dunn placed some reliance on a passage from the judgment of Jenkins L.J. in the same case, where the Lord Justice, after considering the position of a statutory tenant against whom an order for recovery of possession has been made, followed by a period at the end of which actual possession is to be given up, said in regard to such a tenant[16]: " He has nothing left but the " limited interest granted to him by what may perhaps be " described as the indulgence of the court under section 5 (2) " of the Act of 1920. In effect, he has a period of grace." Mr. Dunn said (and I think with some force) that the words " In " effect he has a period of grace " show that Jenkins L.J. had not in contemplation the possibility of an order for possession being entirely discharged, the period of grace merely involving a period of delay before possession is given up.

But I do not think that Jenkins L.J. was applying his mind to a position such as the present; and it is to be observed that the language immediately preceding that phrase which he used was quite general in its character; he said in effect that such a tenant is entitled to the indulgence of the court under section 5 (2) without in any way qualifying the indulgence, or suggesting that such a tenant was entitled only to some part of it. Also, it is further to be noticed, as the Master of the Rolls has pointed out, that in that very case (*American Economic Laundry* v. *Little*[17]) an original absolute order had in fact been watered down, if one may use that expression, by subsequent successful applications under the subsection for suspension; and all the members of the court apparently (as well as counsel) assumed without any question that such suspensions were not open to impeachment or suggestion of invalidity in any way.

Therefore, there is nothing in the *American Economic Laundry* case,[17] as I read it, which is at all destructive of the construction of the subsection which I believe to be the true construction; and no other authority was brought to our attention which could be said to have that effect. But on the other hand, my Lord, the Master of the Rolls, in the two cases to which he has referred in his judgment—*Mills* v. *Allen*[18] and *Haymills Houses Ltd.* v. *Blake*[19]—did indicate, without any dissent from the other members of the court, the view which the county court judge has adopted and applied in the present case; and, as I have already said, I am quite satisfied, if I may respectfully say so, that that view is correct.

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[15] [1951] 1 K.B. 400.

[16] Ibid. 407.

[17] [1951] 1 K.B. 400.

Therefore, when one finds that the construction of the section, if taken by itself, leads to a certain result, and that result has already, on two occasions at all events, received the provisional approval of the Master of the Rolls, and that no authority can be cited against it, it necessarily follows that the prima facie construction, as I think it is, of the subsection should be applied, and that the county court judge was quite right in applying it.

Mr. Dunn did submit certain propositions in support of his argument, with many of which I think I should agree; and especially I might mention his submission that the court should not accept a construction of the subsection which results in an absolute order for possession being subsequently made conditional, and then discharged, unless the language of the subsection is sufficiently clear to warrant such a course. That, and the other propositions on which Mr. Dunn relied, are, however, displaced by the fact that, in my opinion, unsatisfactory in some respects as the language of subsection (2) certainly is, it does show clearly (or sufficiently clearly) that an original order for possession can be the subject of a subsequent order staying or suspending execution, or postponing the date of possession on terms; and that, if those terms are complied with, then the court may discharge or rescind the original absolute order.

I agree with what the Master of the Rolls has said in regard to the form of order which the county court judge made in the present case, in which he resorted to the compendious form of order directing that on fulfilment of conditions, the original order should be discharged, instead of merely making an order imposing conditions, and then waiting to see whether the conditions had been performed, and, if they had been performed, then making another order. I agree with the Master of the Rolls in thinking there is nothing wrong, or beyond the power of the court, in making an order in that compendious form, and I do not really think that Mr. Dunn placed very much reliance on that point.

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[18] [1953] 2 Q.B. 341.

[19] [1955] 1 W.L.R. 237.

For all the reasons which the Master of the Rolls has already stated, and the reasons which I have given, I agree that this appeal should be dismissed.

ORMEROD L.J. I am in full agreement with the judgments delivered by the Master of the Rolls and by my brother Romer, and in the circumstances I have nothing to add. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Wilson, R. L. Houlder & Co.; Parfitt, Creswell & Williams.*

E. D.

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Oct. 23, 24.

Jenkins, Parker and Pearce L.JJ.

INTEROFFICE TELEPHONES LTD. *v.* ROBERT FREEMAN CO. LTD.

[1951 I. 3543.]

Damages — Contract — Breach — Hire of equipment for fixed period — Premature determination of contract by hirer—Similar equipment always in stock—Measure of damages.

By an agreement in writing made in May, 1950, the plaintiffs agreed to instal, let and maintain, and the defendants agreed to hire, an office telephone installation; the agreement was for 12 years and was renewable annually thereafter in the absence of notice to the contrary. In 1956 the defendants, being forced to leave their offices, repudiated the contract. In an action brought by the plaintiffs Pilcher J. awarded as damages the rent for six months (being a reasonable period for finding a new hirer), plus the cost of removal and reconditioning. The plaintiffs, who had at all times a stock of equipment available to meet the demands of potential hirers, appealed as to the quantum of damages:—

Held, that the same principles were applicable as on a breach of a contract to accept and pay for goods; so that, as the plaintiffs had an available stock of equipment, they were entitled to recover a sum representing (i) the future unpaid rentals, less (ii) future maintenance charges, an allowance for the prompt payment of future rentals, and the depreciated value of the equipment recovered, plus (iii) the cost of reconditioning the equipment.

In re Vic Mill Ltd. [1913] 1 Ch. 465 applied.

British Stamp and Ticket Automatic Delivery Co. Ltd. v. *Haynes* [1921] 1 K.B. 377 overruled.

Decision of Pilcher J. reversed.

APPEAL from Pilcher J.

By an agreement in writing made in 1950 the plaintiffs undertook to instal, let and maintain, and the defendants to take delivery of and hire, a 25-line automatic telephone installation. The contract was for 12 years, continuing annually thereafter until either party should give notice in writing. There were subsequent supplemental agreements covering additions to the system.

In 1956 the defendants were forced to leave their existing premises and to move to another office, which was already equipped with an automatic telephone system; they thereupon repudiated the agreements.

At the hearing before Pilcher J. the plaintiffs proved that they held a sufficient stock of equipment to meet anticipated demands from potential customers. Pilcher J. held that the plaintiffs must be treated as having relet the equipment to another customer after a reasonable interval of six months, and limited the award of damages to the lost rental for six months plus expenses of removal and reconditioning.

The plaintiffs appealed on the question of damages. The facts are set out more fully in the judgment of Jenkins L.J.

H. V. Lloyd-Jones Q.C. and *Peter Thomas* for the plaintiffs. When a contract of hire over a period of years is repudiated, the measure of damages should be the same as in the case where a buyer refuses to accept goods sold to him. The principle applicable is laid down in *In re Vic Mill Ltd.*[1] and amounts to this: where the goods in question are in short supply, so that the seller can easily get another customer, he does not truly lose his bargain and can get only nominal or reduced damages; where the goods are in ample supply, a customer who repudiates is a customer lost; the seller loses his bargain and can recover the profit he would have made on it. This principle is illustrated by two recent cases concerning the sale of motor-cars. In *Thompson (W. L.) Ltd.* v. *Robinson (Gunmakers) Ltd.*[2] the make of car in question was in ample supply and the seller recovered his lost profit; in *Charter* v. *Sullivan*[3] the make of car was in short supply and the seller obtained nominal damages only.

The defendants rely on *British Stamp and Ticket Automatic Delivery Co. Ltd.* v. *Haynes*,[4] where the defendant, who had hired two machines from the plaintiffs, refused to accept them. Salter J. awarded as damages, substantially, the loss of rent for such reasonable time as the plaintiffs would require to find another hirer. That decision is contrary to the principle laid down in *In re Vic Mill Ltd.*,[5] which does not appear to have been cited in argument. The *Vic Mill* principle was applied by Barry J. recently in *Telephone Rentals Ltd.* v. *R. C. A. Photophone Ltd.*[6] to a case of hiring; he followed the *Vic Mill* case and *Thompson's* case,[7] and declined to follow the *British Stamp* case,[8] doubting whether it was good law.

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[1] [1913] 1 Ch. 465.

[2] [1955] Ch. 177; [1955] 1 All E.R. 154.

[3] [1957] 2 Q.B. 117; [1957] 1 All E.R. 809.

[4] [1921] 1 K.B. 377.

It was established in evidence that the plaintiffs had always in hand supplies of apparatus to meet any anticipated demand. The damages should be computed in the following way: the starting figure is the total of the lost instalments of rent; from that should be deducted an allowance, say 15 per cent., for maintenance which the plaintiffs would have had to carry out if the contract had run on; from the sum so arrived at the plaintiffs should concede a discount, say 5 per cent., for receiving as a lump sum what would otherwise be receivable over six years, and there should be also deducted a sum representing the depreciated value of the equipment recovered; finally, the plaintiffs are entitled to add the cost of reconditioning the equipment so as to make it available for another hirer.

J. D. May for the defendants. Contracts for the sale of goods are quite different from contracts for the hire of goods. When it comes to estimating damages, one starts with *Hadley* v. *Baxendale*[9] and looks to what the reasonable contemplation of the parties was when the contract was made. In a contract of sale the parties contemplate that property in goods will pass with profit to the vendor; but in a contract of hiring they contemplate that if the goods are prematurely returned, they will be renovated and in due course let out again; the loss to the lessor is the loss of rent while this is being done, as was decided by the judge below and by Salter J. in the *British Stamp* case.[10] In cases of sale of goods it is no doubt right to start with the seller's profit—the price of the goods sold less their cost to him. But one cannot consider rentals payable over a number of years as equivalent to the price of goods to a buyer; questions of interest and maintenance come into consideration, so that there is no true analogy.

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[5] [1913] 1 Ch. 465.

[6] Unreported; Feb. 8, 1957.

[7] [1955] Ch. 177.

[8] [1921] 1 K.B. 377.

[9] (1854) 9 Ex. 341.

[10] [1921] 1 K.B. 377.

C. A.
1957

INTEROFFICE TELEPHONES LTD.
v.
ROBERT FREEMAN CO. LTD.

JENKINS L.J. This is an appeal by a company called Interoffice Telephones Ltd., the plaintiffs in the action, from a judgment of Pilcher J. dated February 26, 1957, whereby he awarded the plaintiffs a sum of £338 damages against the defendants in the action, Robert Freeman Co. Ltd., for breach of a contract under which the defendants agreed to take on hire from the plaintiffs certain office telephone equipment.

There is no dispute of any substance on the facts, apart from some questions of quantum. The issue in the case is as to the proper measure to be applied in assessing the damages payable by the defendants to the plaintiffs in the circumstances of the case.

It is not in dispute that there was a breach of contract. The contract sued upon is dated May 18, 1950, and it was thereby agreed that the plaintiffs (therein called " the company ") should instal, let and maintain in efficient working order, and that the defendants (therein called " the subscriber ") should take delivery of and hire, obtaining and paying for way-leaves where necessary, a telephone installation consisting of one 25-line auto switch-board with 25 automatic telephones at a total basic yearly rental of £165.

There are various provisions, into which I need not enter in detail. There is a provision in clause 7 under which it is provided: " The company shall maintain the installation in satisfactory " working order for the period of the hiring and shall execute " without charge all repairs and replacements necessitated by " normal usage and fair wear and tear." Then there is a provision as to the subscriber notifying defects and as to admitting the representatives of the company to their premises for the purpose of carrying out maintenance, and so on.

Then clause 8 provides: " This contract shall commence on " the signing hereof and shall be for the period ending December 31 after the installation is completed and the following " twelve years. It shall continue annually thereafter at basic " rates unless or until either party gives in writing six months' " prior notice of termination." Then there is this provision in clause 8: " In case of default by the subscriber in payment or " observance of any of the terms of the contract or if the contract " shall be terminated prematurely at the wish of the subscriber " the company shall be at liberty to remove the installation forthwith. The subscriber shall then pay to the company in settlement of all claims including liquidated damages a sum the " equivalent of the rentals still payable or which would have "become payable for the remaining term of the contract less an "allowance of 10 per cent. for maintenance and less a further "allowance of 5 per cent. for each unexpired year of such term."

There were seven supplementary agreements under which 14 further telephone instruments were installed in the defendants' premises, making 39 in all. The consequent additions to the rental made a yearly total of £261 5s. 4d., or, in round figures, £260.

Unfortunately, in June, 1956, the defendants, owing to some matter of town planning, I understand, had to leave their premises in which the telephone equipment had been installed. the result of which was that they could no longer continue in occupation of the offices in which the installation had been made. Moreover, though it had at one time been thought that they could remove, with the concurrence of the plaintiffs, the installation to their new premises, they found that the premises to which they proposed to move were already equipped with an installation of this kind, so that they had no use for anything further in that way.

In those circumstances, the defendants repudiated the contract, and on July 5, 1956, a writ was issued by the plaintiffs claiming a sum of money under the agreement, and the sum claimed was worked out by applying the formula prescribed in clause 8.

The matter came before Pilcher J., and before him the primary argument was whether the provisions of clause 8 were enforceable or were void as constituting a penalty. It was, I think, in the end really conceded that this clause, inasmuch as it is applicable in a number of different circumstances of varying importance, is one which should be classed as a penalty. The argument therefore proceeded on the footing that the provisions of clause 8 expressed to be operative in the event of default should be disregarded and that the plaintiffs should be entitled to recover whatever damages, on the proper principles as to the assessment of damages, they could claim to have suffered through the defendants' default.

There was evidence given by one Newcombe, the secretary of the plaintiff company, and one Lynfield, the managing director of the plaintiff company. I think, for the present purpose, the most important part of their evidence is that which shows that the plaintiffs always had a supply of the internal telephone equipment in which they dealt to meet any demand. As to the character of the business, it seems that it was almost exclusively a hiring business and that the equipment was in fact made for the plaintiffs by another company with whom they had some agreement. The demand for these installations seems to have been limited. Newcombe said that they had running some 70 hire agreements applicable to internal telephones, and that new contracts of hire were entered into at the rate of, say, seven in an average year, and upwards from that to 12, which would be considered a very good year.

The question then arises: how should the damages be assessed? The view taken of that question by the judge was this: he said that the plaintiffs, being under a duty to mitigate their damages, must be treated as hiring out the installation which had been the subject of the contract with the defendants to a fresh hirer. On that principle, he arrived at this result: the plaintiffs must be treated as having, after a reasonable interval in which to find a new customer, hired out to that new customer the installation withdrawn from the defaulting defendants at a similar rent. In that hypothetical state of affairs, the loss suffered by the plaintiffs (apart from incidental expenses) would be the rental during some reasonable period to be allowed them for the purpose of finding a new hirer. For that, the judge allowed a period of six months, making a sum of £130. He added to that in respect of expenses £8, I think, for the cost of removing the installation from the defendants' premises, and a sum of £200 (which was a round figure agreed by counsel) as the cost of reconditioning the plant taken back from the defendants' premises, making a figure in all of £338.

That method of calculating the damages is attacked by Mr. Lloyd-Jones, on behalf of the plaintiffs. His argument is to this effect: he says that one must, on any view, begin with the loss of rental over the period which the contract yet had to run at the time when the defendants repudiated. That is the starting figure. Then from that certain deductions ought admittedly to be made. There should be a deduction for maintenance, and it is admitted that 15 per cent. would be an appropriate figure for that. Then off the net rental so ascertained some discount should be allowed by reason of the fact that the plaintiffs would be receiving in one sum an amount which, had the contract run its full length, they would have received only over a period of six years. Then, as against those items, one must set the depreciated value of the installation recovered from the defendants.

Apart from the question of discount, the figures would work out broadly in this way: the first item was the whole amount of rental for the rest of the term. That has been calculated at £1,698 4s. 8d. Then an allowance of 15 per cent. for maintenance comes to £254 14s. 9d. That leaves a net rental over the period in the form of a lump sum of £1,443 9s. 11d. Then, finally, a deduction is required for the depreciated value of the installation. A tentative suggestion was made that, in view of the evidence, it would be reasonable to take as the depreciated value the sum of £700, which was given in evidence as the cost to the plaintiffs of a similar installation, less the sum of £200 representing, not as a matter of strict calculation but as a matter of round figure, the cost of reconditioning the installation. That illustrates the method of calculation which Mr. Lloyd-Jones says should be adopted. Those figures would require some adjustment in respect of the discount which I have mentioned, but on which I have not ventured to place a figure.

Mr. Lloyd-Jones supports his method of calculation in this way: he says the evidence being that there was always a supply to meet any demand, it cannot be right to bring into account against the plaintiffs a notional re-hiring of the installation taken back from the defendants, for the substituted transaction with a new customer would not in truth diminish the loss sustained by the plaintiffs at all, inasmuch as that substituted customer would simply be taking on hire the machine taken back from the defendants instead of another machine which, as the evidence shows, the plaintiffs could have provided.

That proposition is supported by the authority of this court in the case of *In re Vic Mill Ltd.*[1] That was a case in which a company had ordered certain machines which owing to supervening liquidation they were unable to accept. The suppliers of the machines put in a claim for damages. The machines apparently fell into two categories. First, there were machines which had been completed by the creditors before the date of the winding up, retained by the creditors for a time, then somewhat altered and sold to other customers at a price less than the contract price. Secondly, there were machines which would have been wholly or partially manufactured by the creditors, on which they had done no work, but for some of which they had purchased subordinate parts ready made, which they had afterwards used in fulfilling other orders.

One finds in the course of the argument this interlocutory observation by Hamilton L.J.[2]: " On the evidence the claimants

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[1] [1913] 1 Ch. 465.

[2] Ibid. 468.

"had room in their works to carry out this contract with the "company as well as all their other contracts." Then in the argument for the claimants one finds this[3]: "The fallacy lies in "assuming that the contract for the sale of these machines to "the new purchasers was substituted for the contract with the "company. It was not so. The contracts were independent of "each other. There is nothing to show that we could not have "carried out both contracts."

Then Hamilton L.J. said this in his judgment[4]: "There were "two classes of goods. The first consisted of four quick traverse "winding frames, which at the time of the final breach of the "contract had been manufactured and were ready for delivery. "As to the remainder, they had not been manufactured; some "materials for their manufacture were in the makers' hands, but "no more. Speaking for myself, although a good deal of discussion has taken place upon the law, I think there is no new "question of law involved in this case, but that the appeal is "determined by the facts as soon as they are appreciated. Take "first the group of items, 2, 3, 4 and 6, as to which the manufacturers claimed to be entitled as for loss of profit to just over "£1,000. 'These were various classes of spinning machinery,' "they say, 'which we had a contract to make, which we could "'have made, which we were ready and willing to make, and "'upon which we should have made £1,000 odd of profit; by the "'failure of the buyers to perform their contract the result is "'that we lose our £1,000 of profit.' As to this the learned "registrar held as follows: 'There is no evidence that the "'creditors' works were wholly or partially stopped in consequence of their not manufacturing these machines, or that the "'orders on which the works were employed were of a less "'remunerative nature than the order in respect of which the "'claim for damages is made. In the case of this machinery "'I am of opinion that the creditors are entitled to have the "'prospective profits taken into account in assessing the "'damages, but I consider, having regard to the facts stated "'above, that the loss directly and actually resulting from the "'breach of contract does not amount to anything approaching "'the whole of such prospective profits. I assessed the damages "'in respect of these machines at £250.' On appeal the learned "judge took the view that the sellers, the manufacturers, were "entitled to have the profits that they had lost, namely, the

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[3] [1913] 1 Ch. 465, 469.

[4] Ibid. 470.

"whole of the profits that they would have made had the contract "been performed."

The Lord Justice continued: "Now there is no difference "between these two propositions as to principle, because the "registrar was, in his view, giving the manufacturers the profits "that they had lost; but he said, 'I consider, having regard to "'the facts stated above, that the loss directly and naturally "'resulting from the breach of the contract does not amount to "'anything approaching the whole of such prospective profits.' "That is to say he considered that, if the profits that would "have been made by performing this contract are set against the "profits that were made by performing some other contracts, "the net loss of profit is reduced to £250. That depends on the "proposition that in substance the second class of profits could "not have been made if the first contract had been performed "and the first class of profits had been made. He thought he "had evidence to that effect, but he had none."

Then I think I can pass to a later passage, where the Lord Justice was dealing with the four quick traverse winding frames which had been made by the claimants. He said this[5]: "Having "made the four machines in question, and being unable to get "delivery of them taken and payment made, what was the seller "to do? The only answer to that question is that he was to act "reasonably, and then he would be entitled to such damages as "would put him in as good a position as if the contract had been "performed. It is conceded now that there was no available "market in which the goods could have been promptly sold."

Then the Lord Justice went on: "It follows that he was "entitled to recover the damages directly and naturally resulting "in the ordinary course of events from the buyer's breach of "contract. If the goods had been broken up, or sold by auction "for what they would fetch, as the learned judge surmised, the "consequences to the buyers would have been considerably worse "than they are. It so happened that after the repudiation of "the contract by the Vic Mill another customer of the makers "was prepared to place an order with them for frames of that "kind and somewhat of those dimensions. They might have "taken that order, fulfilled it, made their profit on it, and dealt "with the frames left on their hands in any reasonable way that "they could. They did in fact at a small cost adapt the frames

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[5] [1913] 1 Ch. 465, 473.

"on their hands, and with them fulfilled the order of this other "customer, and so made their profit on his contract. To that "extent the buyers in the present case got the benefit of the "accident that another customer came forward. That was a "reasonable mode of mitigating the damages, but it by no means "follows that the damages are confined to the cost, a trivial one, "of adapting the machines to the needs of the second customer, "and the loss on resale to him, which was only £23, making £28 "in all. The fallacy of that is in supposing that the second "customer was a substituted customer, that, had all gone well, "the makers would not have had both customers, both orders, "and both profits."

The Master of the Rolls agreed, and Buckley L.J. put the point in a convenient form in a short concurring judgment. He said[6]: "I have come to the same conclusion. As regards items "2, 3, 4 and 6 which were not manufactured the respondents "are, I think, entitled to the whole profit, because the appellants "failed to produce any evidence to show that if the works had "been employed to execute the orders under the contract they "would have been unable to execute other orders which they had "received. Under these circumstances no credit need be given "in respect of the employment of the works upon the other "operations."

That case was followed by Upjohn J. in *Thompson (W. L.) Ltd.* v. *Robinson (Gunmakers) Ltd.*,[7] which was a case of default by a purchaser of a motor-car, where the state of the market was such that supply of the motor-cars of the particular make exceeded the demand. In those circumstances, Upjohn J. applied the principle of *In re Vic Mill Ltd.*[8] In the later case in this court of *Charter* v. *Sullivan*,[9] which was another case of a motor-car, *In re Vic Mill Ltd.* was discussed and recognized as stating the right principle to apply in cases in which the supply of the goods in question exceeds the demand; but on the evidence the market there was the other way, so that a different result was reached.

On the other side, we were referred to *British Stamp and Ticket Automatic Delivery Co. Ltd.* v. *Haynes*,[10] which is a decision of Salter J. The headnote to that case reads: "The

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[6] [1913] 1 Ch. 465, 474.

[7] [1955] Ch. 177; [1955] 1 All E.R. 154.

[8] [1913] 1 Ch. 465.

[9] [1957] 2 Q.B. 117; [1957] 1 All E.R. 809.

[10] [1921] 1 K.B. 377.

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"defendant, in breach of his contract, refused to accept two "machines which he had hired from the plaintiffs for three years "at a weekly rent. The plaintiffs, whose business it was to let "out machines, made no attempt to re-let these two machines. "At all times material to this contract they had more than two "machines in stock:—*Held*, that the measure of damages was "not the aggregate of the three years' weekly rents, but (1) the "amount of the weekly rents from the time when they became "payable under the contract, that is the date when the machines "were tendered, until the expiration of such reasonable time as "the plaintiffs would have required thereafter in order to re-let "the machines on hire; (2) the cost of transport of the machines; "and (3) the commission to the agent who procured the contract, "if payable notwithstanding breach."

The case of *In re Vic Mill Ltd.*[11] was not cited in *British Stamp and Ticket Automatic Delivery Co. Ltd.* v. *Haynes*,[12] and I confess that on the facts of that case, so far as they appear from the report, the right decision would, in my opinion, have been a decision in accordance with the principles of *In re Vic Mill Ltd.*, for the evidence appeared to show that the plaintiffs at all times had a stock of machines in hand available to meet the demands of customers. Accordingly, on the principle of *In re Vic Mill Ltd.*, I find difficulty in seeing how the judge could rightly arrive at the conclusion he did. In my judgment, so far as it conflicts with *In re Vic Mill Ltd.*, the decision in *British Stamp and Ticket Automatic Delivery Co. Ltd.* v. *Haynes* cannot stand.

There is one point of distinction between that case and *In re Vic Mill Ltd.*, and that is that *British Stamp and Ticket Automatic Delivery Co. Ltd.* v. *Haynes* was concerned, like the present case, with hiring, while the case of *In re Vic Mill Ltd.*, and one may say also *Thompson (W. L.) Ltd.* v. *Robinson (Gunmakers) Ltd.*[13] and *Charter* v. *Sullivan*,[14] all dealt with sale of goods. Mr. May, for the defendants, has argued that the principle in *In re Vic Mill Ltd.* applies only to cases of sales of goods and has no application to hiring.

That question was considered by Barry J. in an unreported case decided on February 8, 1957, of *Telephone Rentals Ltd.* v. *R. C. A. Photophone Ltd.* The judge came to the conclusion that that was no ground for distinguishing the case before him from *In re Vic Mill Ltd.*[15] On this aspect of the case, he said this: "Giving the matter the best consideration that I can, I "can find no substantial difference between the principles which "should be applied on the breach of a contract to hire goods "from those applicable in claims for damages for breaches of "contract to accept and pay for goods. In my judgment, every "word said by the Lords Justices in the *Vic Mill* case applies to "the circumstances of the present conflict, and I am satisfied "that I should follow *Vic Mill* and the decision of Upjohn J. in "the latter case, *Thompson* v. *Robinson*,[16] in preference to "*British Stamp and Ticket Automatic Delivery Co. Ltd.* v. "*Haynes*,[17] if *British Stamp and Ticket Automatic Delivery Co.* "*Ltd.* is in fact irreconcilable with the other two decisions." In my view, that passage in the judgment of Barry J. is wholly correct. I cannot see how the circumstance that this case is concerned with a hiring and not with a sale of goods can suffice to displace the principle of *In re Vic Mill Ltd.*

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[11] [1913] 1 Ch. 465.
[12] [1921] 1 K.B. 377.
[13] [1955] Ch. 177.
[14] [1957] 2 Q.B. 117.

I would refer to the passage from the speech of Lord Haldane in *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Company of London Ltd.*,[18] which I find cited in the judgment of Upjohn J. in *Thompson* v. *Robinson*.[19] Lord Haldane said this: "'Subject to these "'observations I think that there are certain broad principles "'which are quite well settled. The first is that, as far as "'possible, he who has proved a breach of a bargain to supply "'what he contracted to get is to be placed, as far as money "'can do it, in as good a situation as if the contract had been "'performed.' That is the general rule." It seems to me that that broad general principle is just as much applicable to cases of hiring as to cases of sales of goods.

For the reasons I have endeavoured to state, I am of opinion that this appeal should be allowed, and that the damages should be assessed in accordance with the principles advanced by Mr. Lloyd-Jones, which I have endeavoured to describe in this judgment.

PARKER L.J. I agree. It so happens that within a very few days of the decision of Pilcher J. there were two decisions, first a decision of Barry J., unreported, in *Telephone Rentals Ltd.* v. *R. C. A. Photophone Ltd.*, which dealt in particular with a hiring agreement such as this, and with Salter J.'s judgment. Secondly, the very day before there was a judgment of this court dealing with sale of goods, *Charter* v. *Sullivan.*[20] The judge did not have the benefit of either of those decisions. Further, this point, which has been fully argued in this court, really only arose incidentally in the court below, in that the real issue before Pilcher J. was whether clause 8 of the agreement was a penalty clause or provided for liquidated damages.

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[15] [1913] 1 Ch. 465.
[16] [1955] Ch. 177.
[17] [1921] 1 K.B. 377.
[18] [1912] A.C. 673, 689.
[19] [1955] Ch. 177, 182.

In the light of those cases, I have no doubt that this appeal succeeds. I would only add this: Mr. May sought to persuade us that there was in this matter a difference between a hiring agreement and a contract for the sale of goods, and that whereas a loss of profit was a matter which could be contemplated by the parties, within *Hadley* v. *Baxendale*,[21] that was not so in the case of a hiring agreement. For my part, I find it very difficult to see any such distinction. Whether it be a hiring agreement or a contract for the sale of goods, where the purchaser has failed to take delivery, the defaulting party must contemplate that damages will vary according to the state of the market, including questions of supply and demand. That is true whether it be a hiring agreement or a contract for the sale of goods. The state of the market, the stock position of the supplier and the demand of the public can in no sense be treated as res inter alios acta, so as to make damages claimed on that basis too remote.

I would allow this appeal.

PEARCE L.J. I agree entirely with what my Lords have said.

Appeal allowed.

Solicitors: *Lewis & Dick; John L. Rendall.*

F. R. D.

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[20] [1957] 2 Q.B. 117.

[21] (1854) 9 Ex. 341.

REGINA *v.* SOLOMON.

C. C. A.

1957
Nov. 11.

Lord Goddard C.J., Gorman and Pearson JJ.

Jury—Constitution—Tales—Trial on indictment—No summoned jurors present—Tales prayed by clerk of the peace—Twelve jurors collected—Whether jury competent—Course to be adopted in future.
Criminal Law—Venire de novo—Procedure—Warrant for arrest—Venue.

The appellant was indicted for larceny before quarter sessions. The jurors, summoned the previous day, had been dismissed, and so the clerk of the peace prayed a tales, in the sense that he collected 12 people who had not been empanelled to act as jurors. The appellant was convicted and appealed on the ground that the jury was improperly constituted and therefore the trial was a nullity:—

Held, ordering a venire de novo, that at common law (since section 37 of the Juries Act, 1825, did not apply to quarter sessions) a jury could not be constituted entirely of talesmen, and, where no summoned jurors were present, instead of a tales being prayed, the right course was for a fresh jury panel to be empanelled instanter, or, if that could not be done, to adjourn the trial; accordingly, in the present case the trial was a nullity.

Quaere, whether persons liable to act as talesmen must be actually present in the precincts of the court or whether they can be brought into the court from the street.

Appeal against conviction.

The appellant, Dr. Donald James Solomon, was indicted before the Recorder of Brighton for larceny. When the case came to be tried, due to some mistake all the jurors who had been in attendance at Brighton Quarter Sessions the previous day had been dismissed. The clerk of the peace, finding no empanelled jurors present, proceeded himself to pray a tales, and collected 12 persons to act as jurors. He told the Recorder and the parties what had happened and counsel for the appellant said that he had no objection to the jury as a whole. The trial then proceeded and the appellant was convicted and fined £50 with £25 costs.

The appellant appealed on the ground that the jury was an improper jury and the trial a nullity.

Edward Clarke and *Colin Wilson* for the appellant. The appellant appeals against his conviction on a point of law, namely, that the jury was improperly summoned and therefore the trial was a nullity. When the appellant appeared to take his trial there were no jurors present. The clerk of the peace himself prayed a tales, by taking four persons from the back of the court and eight from an office across the road. There are three points which make this tales illegal. First, one cannot pray a tales where no jurymen are present. Secondly, the talesmen must be duly qualified, namely, able men of the county; in the present case at least two of the talesmen lived outside the county borough. Thirdly, a tales cannot be prayed unless it is asked for in open court by the prosecution or the defence.

[LORD GODDARD C.J. Is not the clerk a prosecutor of the Queen?]

That is not a possible construction on the words of section 37 of the Juries Act, 1825. On the first point, it appears plainly from section 37 that a tales cannot be prayed when no jurors at all are present. In those circumstances the proper course is to apply for a new panel. The second point—whether the talesmen are properly qualified jurors—depends on whether they are " able " men of the county." According to Halsbury's Laws of England, 2nd ed., vol. 19, p. 309, note (*e*), those words would seem to point to persons whose names would be in the jurors' book. By section 4 of the Juries Act, 1922, the persons qualified to sit in a borough court are those " whose names are included in so " much of the jurors book for the area comprising the borough " as relates to the area of the borough . . ." By section 1 of the Juries Act, 1825, any juror who is qualified to act as a juror in a county shall be liable to serve on a jury in any assize court, but he can only sit on a jury in his own county for courts of sessions of the peace. Accordingly, court of sessions of the peace meaning quarter sessions, only those persons who lived in the county borough of Brighton would be qualified to serve on the jury in the present case. This being a county borough, the same provisions are applicable as to a county.

[LORD GODDARD C.J. What is the constitution of a county borough?]

Section 31 of the Local Government Act, 1888, provides that each of certain large named boroughs " shall . . . be for the " purposes of this Act an administrative county of itself . . ." It seems as if, for jury purposes, a county borough is no different from an ordinary borough and jurors of the county can sit as jurors of the borough. Accordingly, " able men of the county " in section 37 of the Act of 1825 may mean duly qualified men of Sussex and not of Brighton.

[LORD GODDARD C.J. It would appear that in any event section 37 of the Act of 1825 does not apply to borough quarter sessions at all.]

The submissions have been made on the basis that section 37 is applicable to borough quarter sessions, but it is now conceded that probably local or borough quarter sessions are not included in the provisions of section 37. If that is so, one has to go back to the old common law, and one finds a division of opinion between Blackstone and Hawkins, because Hawkins says that one cannot pray a tales at all in a criminal court: Hawkins' Pleas of the Crown, vol. 2, c. 41, s. 18, p. 566. [Reference was also made to Hawkins' Pleas of the Crown, vol. 2, c. 41, ss. 17 and 19.]

[LORD GODDARD C.J. Hale says that a judge may order a sheriff to return a panel instanter without further precept.]

That only applies to a judge at assizes. Hale seems to have been of the opinion that justices of the peace should have the same powers as judges of assize when trying cases on indictment: Hale's Pleas of the Crown, vol. 2, p. 28. [Reference was also made to Hale's Pleas of the Crown, vol. 2, pp. 261, 265.] Blackstone says that a tales may be awarded in criminal cases as in civil cases: 4 Comm. 355. He also says that no tales can be prayed in gaol delivery but a new panel can be ordered instanter: 3 Comm. 464. Whether it be at common law, or under the statute, there must be a quales before one can pray in aid a tales. If, contrary to what is submitted, one can pray a tales when there are no jurors at all, the talesmen have to be called from "such "other able men of the county then present." "Then present" must mean present within the precincts and would not enable the clerk to pray a tales de circumstantibus by telephoning to a nearby office for further people, who might not even be properly qualified.

C. J. T. Pensotti for the Crown. It is conceded at once that it is improper to summon talesmen if there is no quales. The only point, therefore, is whether the fact that the panel of jurors were present on the preceding day is sufficient for the quales. The proper time for an objection to the jury to be made is when the jury is sworn. In the present case the matter was put before the court, and counsel for the defence said that he had no objection. If the clerk of the peace says that the jurors are qualified, they must be accepted as qualified unless the contrary is shown. [Reference was made to *Brunskill* v. *Giles* [1] and *Rex* v. *Wakefield*.[2]] The only other point is whether it is necessary for the appellant to show that he was taken by surprise.

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[1] (1832) 9 Bing. 13.

[2] [1918] 1 K.B. 216; 34 T.L.R. 210; 13 Cr.App.R. 56.

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Clarke in reply. One cannot assent to something which is an irregularity: *Rex* v. *Cronin*.[3]

LORD GODDARD C.J. The appellant was indicted before the Recorder of Brighton for larceny. He is a doctor who was charged with stealing money out of the pockets of patients or persons at the hospital where he was employed. When the case came on to be tried, through some mistake all the jurors who had been summoned at the Brighton Quarter Sessions and who had been in attendance the previous day had been dismissed. The clerk of the peace, finding himself without any jurors, proceeded himself to pray a tales, in the sense that he sent out and collected 12 people. We need not go into the question whether or not they had qualifications by living in the borough. Suffice it to say that they were all people who lived either in the county borough of Brighton or in the county of Sussex. He got 12 people into the box. He told the Recorder and the parties what had happened, and the appellant, who was represented by Mr. Harold Brown Q.C., was asked if he had any objection, and counsel said that he had no objection to the jury as a whole.

Having been convicted and given an extraordinarily lenient sentence, the appellant has now taken the point that the jury by which he was convicted was an improper jury and, therefore, the trial was a nullity. This brings up the question of how a tales can be properly prayed and what are the necessities before talesmen can be empanelled as jurors. A good many questions have been raised in this case, and one may say that the law with regard to talesmen is very obscure, particularly with regard to proceedings at quarter sessions, because section 37 of the Juries Act, 1825, which deals with tales de circumstantibus, does not apply in terms to quarter sessions. It applies to courts of assize, any of the superior civil courts of the three Counties Palatine, that is, Durham, Lancaster and Chester, "or before any court "of great sessions." That is, the Court of Great Sessions of Wales, which had existed since the reign of Henry VIII, but they are not quarter sessions of the peace, which is an entirely English court, and not a court of great sessions. Therefore, if a tales is prayed, at any rate at borough quarter sessions and, I think, county quarter sessions, the common law must prevail and, as I say, the common law seems to be somewhat obscure on the subject.

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[3] (1940) 27 Cr.App.R. 179; 56 T.L.R. 457; [1940] 1 All E.R. 618.

We have been referred to passages in Hale, Blackstone, and Hawkins' Pleas of the Crown. I think one thing does emerge as certain, and it is on this we propose to base our judgment, and that is that you cannot have a complete jury of talesmen. The procedure is this: for quarter sessions, two justices of the peace at least send their precept to the sheriff to summon jurors, just as judges who are going on assize send their precept to the sheriff, and the sheriff acting in accordance with the precept must prepare panels. He summons jurors, and he returns the panel to the judge or the clerk of the peace of quarter sessions. It will be known by members of the Bar that at the assizes the crier addresses the sheriff and calls on him "to return the "several writs and precepts to you delivered and returnable "here this day that my Lords the Queen's Justices may "proceed thereon," and the sheriff then hands to the judge the jury panel. Those are the jurors he has summoned. I think if there is a defect in the jury, that is to say, if a full jury cannot be empanelled from the names on the panel, a tales can be prayed. Whether the talesmen must be actually present in the precincts of the court or can be brought in from the street, we need not inquire because we do not want to give a decision on any point that is immaterial. But it seems to the court that you cannot have a jury composed entirely of talesmen because the very fact that it is a tales implies that there must be a quales. Since writs of error were done away with, records are not now drawn up, but if the record had been drawn up the jury panel would have had to be set out in the record and the names of the jurors who actually were empanelled to try the issue. If there were no jurors who were in the original panel, it would have been plain on the record that 12 people tried the accused who had not been summoned, and if a tales is to be summoned there must be, as it seems to the court, a jury composed partly of those who have been summoned, the quales, and added to them, if the record had been drawn up, such persons standing by as would make up the full jury. In this case all the persons who tried the case had never been summoned. If there is a complete defect or shortage of jurors, as happened in this case, the court desires to say that in their opinion the proper course is to require the sheriff to return a further panel instanter. It may be that at borough quarter sessions it would be impracticable. We have not been into that, but if this happens again and the trial is to proceed on the same day, it seems to us that the right course instead of praying tales is to require a fresh panel to be empanelled instanter or, if that cannot be done, to adjourn the trial.

We feel bound to say that the people who tried this case were unqualified. There was no qualified person in the sense of a person on the jury panel among them, and it is not a matter of saying that as no objection was taken and the appellant and his counsel had knowledge of what had taken place, the court cannot give effect to the objection or ought not to give effect to the objection on the ground of waiver or on whatever ground one likes to put it because it seems to the court that there was no jury at all. As there were no quales but only tales, it follows that there were not tales because you cannot have a tales without a quales. Therefore, it is as if the trial had taken place before no jury at all. We feel bound, therefore, with great reluctance—and it is an unfortunate objection I think for this man to take, but he is entitled to take it—to say that we must set aside the verdict and judgment that were given in this case. We shall certainly order a venire de novo to issue, and we shall order a warrant to be issued for the arrest of this man, who can then be taken before justices and bailed to appear again at the next sessions, because venire de novo is a new trial and he must be tried over again. The court will therefore give directions to the Master of the Crown Office that a warrant must be issued for his arrest and the justices can proceed to bail him, and he can be tried at the next quarter sessions.

Edward Clarke for the appellant. Two points arise on the court's order. First, the form of order which would appear to be the proper form, does not involve a warrant. The order of the court in *Rex* v. *Cronin*[1] was: "Upon consideration "being this day had by the Court of Criminal Appeal, as duly "constituted for the hearing of appeals under the Act, of the "appeal of the above-named appellant against conviction, the "court doth finally determine the same, and doth order that "the conviction and judgment on the indictment whereon the "appellant was convicted be set aside and annulled, and that "the appellant do appear at the next quarter sessions . . . there "to take his trial according to law upon the said indictment." There is no necessity for a warrant. As regards the second point, if the court orders that the appellant be taken before justices, the court is asked to order that he should be tried at the East Sussex Quarter Sessions and not Brighton again in view of certain publicity and other matters not only concerning the justices' proceedings.

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[1] (1940) 27 Cr.App.R. 179, 181; 56 T.L.R. 457; [1940] 1 All E.R. 618.

In *Rex* v. *Cronin* [2] the court ordered the appellant to be tried elsewhere. In *Cronin's* case [3] Mr. Boyd-Carpenter asked: "In "view of the publicity which this matter has obtained in Bury "St. Edmunds, the court is asked to direct that the trial shall "take place at the next Ipswich Borough Quarter Sessions. "The court is asked also to continue the appellant's bail." The Crown raised no objection, and the court continued the appellant's bail on the same terms, and continued: ". . . in view of the "application of the appellant, which has been assented to on "behalf of the Crown, we are prepared to allow the case to be "tried at the next Ipswich Borough Quarter Sessions."

LORD GODDARD C.J. The court will order the appellant to be arrested and taken before justices where he can be bailed. If the appellant were here the court might have considered bail. I do not see why this case should not be tried at Brighton and the court will not make any order. Venire de novo is strictly addressed to the sheriff. It will go back to the same court, but that does not prevent the appellant, if he wishes, from making an application to the Queen's Bench Division.

Appeal allowed.
Venire de novo ordered.

[At the subsequent trial on January 13, 1958, at East Sussex Quarter Sessions at Lewes, before a bench, with Lord Denning as chairman, and a jury, the appellant was acquitted.]

Solicitors: *Hempsons; The Town Clerk, Brighton.*

C. J. E.

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[2] 27 Cr.App.R. 179.

[3] Ibid. 182.

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1957
Nov. 6, 7,
8, 26.

Jenkins,
Parker and
Pearce L.JJ.

DAVIE *v.* NEW MERTON BOARD MILLS LTD. AND ANOTHER.

[1954 D. 1495.]

Negligence—Safe system of work—Plant and equipment—Latent defect —Injury to workman's eye caused by tool with latent defect—Tool supplied by reputable supplier—Tool made by reputable makers— Tool negligently made—Employers' liability—Makers' liability.

The plaintiff, a maintenance fitter, was knocking out a metal key by means of a drift and hammer when, at the second blow of the hammer, a particle of metal flew off the head of the drift and into his eye, causing injuries. The drift, which had been provided for the plaintiff's use by his employers, although apparently in good condition, was of excessive hardness, and was, in the circumstances, a dangerous tool; it had been negligently manufactured by reputable makers, who had sold it to a reputable firm of suppliers who, in turn, had sold it to the employers, whose system of maintenance and inspection was not at fault.

The plaintiff claimed damages for negligence against his employers on the ground that they had supplied him with a defective tool, and against the makers on the ground that, as the manufacturers of the drift, they were under a duty to those who they contemplated might use it.

Ashworth J. gave judgment for the plaintiff against both defendants, but made an order that the makers should wholly indemnify the employers with regard to damages.

On appeal by the employers:—

Held (Jenkins L.J. dissenting), that the employers, being under a duty to take reasonable care to provide a reasonably safe tool, had discharged that duty by buying from a reputable source a tool whose latent defect they had no means of discovering.

Wilsons & Clyde Coal Co. Ltd. v. *English* [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628 and *Thomson* v. *Cremin* [1956] 1 W.L.R. 103n.; [1953] 2 All E.R. 1185 distinguished.

Donnelly v. *Glasgow Corporation*, 1953 S.L.T. 161 not followed.

Per Jenkins L.J., dissenting. The law does not, as I understand it, accept reliance on the care and skill of others as a performance of the [employers'] duty. It would, as I think, be an irrational and intolerable refinement to distinguish for this purpose between tools made by a manufacturer to the order of an employer and tools bought by the employer ready made.

Per Parker L.J. The plaintiff can only hold the defendants liable if the true duty of a master is not merely to take care to provide a reasonably safe tool, but to provide a tool which has been manufactured with reasonable skill and care even where the manufacturer is in no contractual relationship with the master. Unless constrained to do so by authority I would be loth to hold that there was any such duty. Having considered the authorities I have come to the conclusion that a judgment in favour of the plaintiff involves an extension of the duty owed at common law by a master to his servant. Now that the doctrine of common employment is abolished, and now that the workman can recover direct from the negligent manufacturer, I can see no justification for extending the duty to exercise reasonable care as enunciated by Lord Herschell in *Smith* v. *Baker* [1891] A.C. at p. 362; 7 T.L.R. 679.

Decision of Ashworth J. [1957] 2 Q.B. 368; [1957] 2 All E.R. 38 reversed.

APPEAL from Ashworth J.

The plaintiff, James Gibson Davie, was at all material times employed by the first defendants, the New Merton Board Mills Ltd., as a maintenance fitter. On March 8, 1953, in the course of his employment, the plaintiff was using a drift, provided by his employers for use by their fitters, to knock out a metal key which he was trying to fit into a coupling. He struck the head of the drift with a hammer, and at the second blow, which was not unreasonably hard, a piece of metal flew off the head of the drift into the plaintiff's eye and caused injury. The drift had been purchased by the first defendants at a reasonable price from a reputable supplier, C. A. Baldwin & Co., who in turn had bought it from the manufacturers, the second defendants, Frank Guylee & Son Ltd., both transactions taking place in 1946.

The plaintiff claimed damages for negligence against the first defendants on the ground that they had provided for his use a defective tool; and against the second defendants alleging that they, as manufacturers, were under a duty to those whom they contemplated would use the drift. At the trial of the action Ashworth J. found that the hardness of the drift was greatly in excess of the hardness which should have existed having regard to the fact that it was intended and designed to be struck on its head with a hammer, and that this condition would not have occurred if proper care had been taken by the second defendants in the manufacture; further, that in the circumstances the drift was dangerous in that chips or particles might fly off it when struck. But the drift was apparently in good condition and no allegation was or could be made that the employers' system of maintenance or inspection was at fault.

Ashworth J. gave judgment for the plaintiff against both defendants, but directed that the employers should have a full indemnity against the manufacturers in respect of damages. The employers did, but the makers did not, appeal on the issue of liability. All the parties made appeals and cross-appeals on contingent issues as to costs.

R. Marven Everett Q.C. and *H. Tudor Evans* for the employers. The question is, whether the employer's duty is to take reasonable care to provide and maintain reasonably safe appliances, premises and systems of work, or whether the employer warrants that reasonable care has been taken by the makers of tools used in the business, which have been bought from reputable suppliers, however remote in time or distance the makers may be. Here it is plain that the makers could not in any way be the employer's agents.

The decision below was based on reasoning which seems to be on a sort of converse of the line of argument in *Donoghue* v. *Stevenson*[1]; one has to travel backwards over a length of time from the employers through the admittedly innocent merchants to the makers, and conclude by identifying the employers with the makers. If the judge's conclusion was right, it would be much simpler to say that the employer warrants the tool, a conclusion quite contrary to authority. Of course, an employer owes a duty to take care by himself, his servants and agents, but it would be extending the law of vicarious liability to travel beyond the ambits of the maxims respondeat superior and qui facit per alium facit per se. The employers were guiltless of personal negligence and the makers were in no sense their agents. The only direct English authority on the question is *Mason* v. *Williams & Williams Ltd.*,[2] and is in favour of the employers.

Much reliance was placed below on *Wilsons & Clyde Coal Co. Ltd.* v. *English*,[3] but in considering that case it should be remembered that the person in default was the employers' agent. If it should be thought that the language of any of the speeches, particularly that of Lord Maugham,[4] supports the extension of an employer's liability now contended for, it is submitted that such language went further than the facts of that case required. But the whole current of authority collected in that case indicates that the employer's duty is limited to the acts of himself, his servants and agents.

Of the cases relied on by the plaintiff, in *Paine* v. *Colne Valley Electric Supply Ltd.*[5] the unsafe electrical apparatus, though constructed by independent contractors, was designed by the employers, and the defect was not latent to them; the facts are quite distinguishable from the present case. In *Donnelly* v. *Glasgow Corporation*[6] the defenders were held liable to their employees on an omnibus for injuries arising from defects in the springs, and it was said that "the supplier and the master are "as one." As to that, the makers were considered throughout as the employers' agents, there being a direct contractual connexion, and it appears that the defenders were in some degree responsible for the design; in any event some of the observations in the case go too far. *Naismith* v. *London Film Productions Ltd.*[7] contains expressions now recognized to be too wide.

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[1] [1932] A.C. 562; 48 T.L.R. 494.

[2] [1955] 1 W.L.R. 549; [1955] 1 All E.R. 808.

[3] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.

[4] [1938] A.C. 57, 87.

[5] (1938) 55 T.L.R. 181; [1938] 4 All E.R. 803.

When considering the responsibility of an employer for the actions of third parties it would be anomalous if his liability in regard to tools purchased in the market should be distinguished from his liability in respect of outside premises where his employees have to go to work: see *Taylor* v. *Sims & Sims*,[8] *Cilia* v. *H. M. James & Sons*,[9] *Cole* v. *de Trafford (No. 2)*[10] and *Hodgson* v. *British Arc Welding Co. Ltd.*[11]; where the employer has no control over such premises he is not liable; it cannot be said that the occupier can be the agent of the employer, and if the decision below is right it would mean that one rule applies to tools and another to premises.

Reliance was placed for the plaintiff on certain observations of Lord Wright in *Thomson* v. *Cremin*,[12] but in that case the accident was due to the fault of shipwrights to whom the defendant shipowner had entrusted the task of putting up the necessary shores and shifting-boards in the hold of the ship where the accident later took place; the plaintiff's employers, the stevedores, were exonerated.

The realities of the situation lead to this conclusion, if the decision below is right; either (1) contrary to all authority, an employer warrants that all reasonable care has been taken by all concerned whomsoever and wheresoever, or (2) the employer must in some way be taken to be identified with a manufacturer of whom he has no knowledge, under the principle either of respondeat superior or qui facit per alium. The second alternative is demonstrably erroneous on its face. It is really a question of fact in each case whether reasonable care has been taken.

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[6] 1953 S.C. 107; 1953 S.L.T. 161.

[7] [1939] W.N. 86; [1939] 1 All E.R. 794.

[8] [1942] W.N. 124; 58 T.L.R. 339; [1942] 2 All E.R. 375.

[9] [1954] 1 W.L.R. 721; [1954] 2 All E.R. 9.

[10] [1918] 2 K.B. 523.

[11] [1946] K.B. 302; 62 T.L.R. 275; [1946] 1 All E.R. 95.

[12] [1956] 1 W.L.R. 103n., 109; [1953] 2 All E.R. 1185.

Martin Jukes Q.C. and *Malcolm Morris* for the plaintiff. The true principle laid down from the earliest times is that the duty of the employer to take care that proper tools are provided for his servants cannot be satisfied by obtaining the tools from an independent contractor. Secondly, the employer's duty is analogous to that of an invitor. Thirdly, cases of accidents to employees occurring on the premises of third parties are not relevant to the present issue, for where an employer has no choice or control he cannot have a duty.

Thomson v. *Cremin*[13] indicates (as does *Haseldine* v. *Daw & Son, Ltd.*,[14] though the substantive decision cannot now stand) that the duty of an employer is higher than that of an invitor; the reason why the employers escaped liability was that they had no control over the place where their men were working.

There is a long line of authority which shows that an employer is liable for the failure to provide proper and safe tools; the matter is summed up in Glegg on Reparation, 4th ed., at p. 384, by the statement that the duty to supply adequate plant is not satisfied by a purchase from reputable manufacturers: see *Macdonald* v. *Wyllie*,[15] *Wilson* v. *Merry and Cunningham*,[16] *M'Killop* v. *North British Railway Co.*[17] and *Bain* v. *Fife Coal Co. Ltd.*[18] The duty is one which a master cannot delegate.

In *Wilsons & Clyde Coal Co.* v. *English*[19] there is no suggestion that the employer's duty could be discharged by resort to an independent contractor; the speeches show that the employer's duty is equated to a statutory duty, and there is no sustainable reason why the duty should vary according to whether the defective tool is made in the employer's own workshop or by an independent contractor. In *Thomson* v. *Cremin*[20] Lord Wright explained and to a large extent repeated his observations in *Wilsons'* case. In *Donnelly* v. *Glasgow Corporation*[21] the Court of Session decided the very point now in issue and held that the supplier and the master were as one so far as the injured servant is concerned. The law of England on this point is the same as that of Scotland and it is desirable that there should be uniformity between the two. *Paine* v. *Colne Valley Electric Supply Co. Ltd.*[22] was not decided on the basis of the employers' responsibility for the bad design of the apparatus; it was held outright that there was a duty which the employers could not delegate. The plaintiff's contentions are supported also by *Naismith* v. *London Film Productions Ltd.*[23] and *Cassidy* v. *Ministry of Health.*[24] The only decision in the employers' favour is *Mason* v. *Williams & Williams Ltd.*,[25] which was decided on circuit, no authorities being cited.

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[13] [1956] 1 W.L.R. 103n.
[14] [1941] 2 K.B. 343; 58 T.L.R. 1; [1941] 3 All E.R. 156.
[15] (1898) 1 Fraser 339.
[16] (1867) 5 Macph. 807.
[17] (1896) 23 Rettie 768.
[18] 1935 S.C. 681.
[19] [1938] A.C. 57.
[20] [1956] 1 W.L.R. 103n.
[21] 1953 S.C. 107.
[22] 55 T.L.R. 181.

If the employer seeks to rely on the fact that the defect was latent to him he must so prove. The proper test of what constitutes such a defect is that it is not discoverable by the exercise of reasonable care: see *Pinnock Bros.* v. *Lewis & Peat Ltd.*[26]

Cases (such as *Taylor* v. *Sims & Sims*[27] and *Hodgson* v. *British Arc Welding Co. Ltd.*[28]) in which an employer has been held not to be liable for injuries to his employees occurring on outside premises fall into quite a different category. It has always been recognized that where workmen are using premises or plant over which the employer has no control, he is not liable for defects, subject to this: that where the defect is obvious, he would be under a duty to take steps to safeguard his employees, though he is not under a duty to inspect the premises. But where the tools or premises are the employer's own, he has a choice in the matter; he can buy what tools he likes.

If it seems hard that an employer should be made liable on the present facts, the workman's position should also be considered. He may not be able to find out who the maker was; or the maker may be a foreigner established in some country where the rule in *Donoghue* v. *Stevenson*[29] does not prevail. His chance of recovering damages may be quite remote. It would not be unreasonable to say that as a matter of contract the workman is entitled to be given a sound tool.

Morris following. If the employers are right, the following situation may arise. Three workmen, A, B and C, each take a drift respectively specially made for the employer, bought by the employer from a reputable supplier and made in the employer's own workshops. Each drift is defective and each employee is injured, the defect in each case being patent to the persons making the tool but not to others. In an action A will possibly

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[23] [1939] W.N. 86; [1939] 1 All E.R. 794.

[24] [1951] 1 T.L.R. 539; [1951] 1 All E.R. 574.

[25] [1955] 1 W.L.R. 549.

[26] [1923] 1 K.B. 690; 39 T.L.R. 212.

[27] 58 T.L.R. 339.

[28] [1946] K.B. 302.

[29] [1932] A.C. 562.

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succeed; B will fail, while C will succeed; while the employers will be advised to hand over their toolmaking to a subsidiary company or to buy their tools in the market. It is an entirely reasonable proposition that the employer's duty should be to provide a tool properly made so far as reasonable skill and care can provide.

Everett Q.C. in reply. The case for the plaintiff has had to be put on the basis either of vicarious liability or of contractual warranty; the real basis of the arguments advanced was the latter. The only possible warranty must be, not that the tool is suitable, but that reasonable care has been taken by the master, his servants and agents. In purchasing a tool, or anything else in the market, an employer does not make the maker or distributor his agent, so as to be vicariously liable. It is conceded for the plaintiff that in the cases dealing with defective premises the employer owes no duty where he has no control. But in any case based on warranty, control is irrelevant, and no sound distinction can be made between faulty premises and faulty plant.

In considering the authorities, they do not, except *Donnelly's* case,[30] afford support for the extreme proposition put forward by the plaintiff; that decision went further than was necessary, as the corporation were liable to their driver and conductor on other grounds. In *Macdonald's*,[31] *M'Killop's*[32] and *Bain's*[33] cases there was a definite entrusting or delegation by the employer. In *Wilson* v. *Merry and Cunningham*[34] there is no mention of reasonable care and the case cannot stand with more modern cases. *Wilsons & Clyde Coal Co. Ltd.* v. *English*[35] is authority for no more than this: that the duty laid on the employer is not retrospective but current, and that his liability is limited to the actions of the persons whom he uses as servants, agents or independent contractors for the particular purpose. [*Mowbray* v. *Merryweather*[36] was referred to.]

It is submitted that the duties of employers and workmen in this respect no longer sound in contract but in tort since the changes in the law regarding common employment and employers' liability. Of course, there is a contract, but that merely provides the element of proximity necessary to bring into effect the doctrine of *Donoghue* v. *Stevenson*.[37] All recent common law cases dealing with employers' liability have been based on tort; see also Crown Proceedings Act, 1947, s. 2, and *Paris* v. *Stepney Borough Council*.[38] If based on tort, the case can only be one of vicarious liability based on the acts of servants or agents.

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[30] 1953 S.C. 107.
[31] 1 Fraser 339.
[32] 23 Rettie 768.
[33] 1935 S.C. 681.
[34] 5 Macph. 807.
[35] [1938] A.C. 57.
[36] [1895] 1 Q.B. 857.
[37] [1932] A.C. 562.

Cur. adv. vult.

November 26. The following judgments were read.

JENKINS L.J. This is an appeal by the first defendants, the New Merton Board Mills Ltd., from a judgment of Ashworth J. dated March 14, 1957, which awarded the plaintiff, James Gibson Davie, against the first defendants and the second defendants, Frank Guylee & Son Ltd., the sum of £2,030 damages, with costs, in respect of the loss of the sight of his left eye through the breaking of a tool called a "drift," manufactured by the second defendants and provided for his use by the first defendants, by whom he was employed as a maintenance fitter at their factory at Merton.

The judgment further dealt with the question of contribution between the defendants by directing that the first defendants should have against the second defendants a full indemnity in respect of the damages, and an indemnity in respect of the plaintiff's costs limited to two-fifths thereof.

There is no appeal by the second defendants in respect of their liability to indemnify the first defendants against the full amount of the damages awarded; but the first defendants' appeal includes a claim to the effect that even if they fail to secure the reversal of the judge's decision as regards their liability to the plaintiff, they should not be ordered to pay any part of the plaintiff's costs. The second defendants have accordingly served a notice of their intention to support the judge's order as to costs, and if necessary to raise various alternative contentions in that regard. The plaintiff, on his part, has served a notice of his intention to raise various contentions as to the incidence of costs in the event of the first defendants succeeding in their appeal on the issue of liability.

The accident happened on March 8, 1953. On that day the plaintiff, in the ordinary course of his employment, was working on a machine and had occasion to separate certain parts which were fitted together too tightly for separation by hand. The appropriate tool for this purpose was a drift, which may be described as a tapered bar or strip of metal say 12 inches long.

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[38] [1951] A.C. 367; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.

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The proper method of using a drift is to hold the pointed end against the point of junction between the parts to be separated and to beat the thick end with a hammer so as to force them apart. The plaintiff went to a cupboard where drifts provided by the first defendants for the use of their employees were kept, took one which appeared to be nearly new, and proceeded to work with it in the way I have described; but unfortunately, at the second stroke of the hammer, the drift broke and a piece flew off, striking, and destroying the sight of, his left eye.

The history of the defective drift can be shortly stated. It was made by the second defendants, who are tool makers carrying on business at Sheffield, in the year 1946, and on a date prior to July in that year it was sold by the second defendants to a company called Baldwin & Co. Ltd., who are suppliers of tools of this kind. In July, 1946, the first defendants ordered a supply of drifts from Baldwin & Co. Ltd., and the drifts delivered to them by Baldwin & Co. Ltd. in response to this order included the defective drift with which we are now concerned. Nearly seven years later this drift, which had in the meantime apparently been seldom if ever used, was put into use by the plaintiff with this disastrous result I have mentioned. The drift was defective in that the steel of which it was made was excessively hard and consequently liable to fracture when subjected to blows of the force to which a drift in ordinary use would be subjected. This was a defect which ought to have been discovered by a manufacturer using reasonable skill and care in the making of drifts.

There is no dispute as to the facts, but it is right to refer specifically to the following findings of the judge. He said: "On the evidence I am satisfied in regard to the drift used by "the plaintiff (a) that it was made of silico-manganese steel; "(b) that the hardness of its head was 622 according to the "Vickers Pyramid hardness scale; (c) that this hardness was "greatly in excess of the hardness which should have existed, "having regard to the fact that the drift was intended and "designed to be struck on the head with a hammer; (d) that in "the circumstances the drift was dangerous, in that chips or "particles might fly off it when struck." He later said: "As "already indicated, I am satisfied that the drift P.2 was of "excessive hardness, a condition which would not have occurred "if proper care had been taken during the heat treatment "process." He continued[1]: "The problem of liability must "be considered on the basis that the employers provided for

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[1] [1957] 2 Q.B. 368, 373; [1957] 2 All E.R. 38, 384n.

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"their employee, the plaintiff, a dangerous tool which had been "negligently made by the second defendants. I consider first "the question whether in these circumstances the employers "are liable. In the first place, it is clear that no negligence can "be attributed to any of the employers' own servants or agents. "The drift P.2 was apparently in good condition and no allegation "was or could be made that the employers' system of maintenance or inspection was at fault. Moreover, the employers "bought the drift from a reputable supplier and paid a reasonable "price for it."

The judge then proceeded to state the question of law arising on his findings of fact in these succinct terms: "The problem "arises in naked simplicity: Are they"—that is, the first defendants—"responsible to the plaintiff because the drift was "negligently manufactured by the second defendants?"

One may take as a starting point in the discussion of this question the well-known case in the House of Lords of *Wilsons & Clyde Coal Co. Ltd.* v. *English.*[2] By that case it was clearly established that an employer's duty to take reasonable care for the safety of his employees is a duty personal to him, of which he cannot divest himself by entrusting the performance of it to a servant or agent however competent. It follows that if in the present case the first defendants had employed some competent person as their servant or agent to make drifts for the use of their fitters, and the person so employed had negligently made the defective drift which broke and injured the plaintiff, the first defendants would clearly have been liable to the plaintiff for breach of their common law duty to take reasonable care to provide sound tools, and the fact that they had employed a competent servant or agent to perform that duty would have afforded no defence.

I think it must also be regarded as settled that the same result would have ensued if the defective drift had been made by the second defendants to the order of the first defendants, the second defendants being in the position of independent contractors, as distinct from servants or (in the strict sense) agents of the first defendants.

It is true that the speeches in the *Wilsons & Clyde Coal Co.'s* case[3] do not in terms refer to independent contractors, for the very good reason that the case then before the House was one in which the employers claimed to have delegated their statutory duty of providing a reasonably safe system of work to an agent in the strict sense, and to have thereby performed it, with the result that any negligence on the part of the agent would as between the agent and any employee injured thereby be negligence on the part of a fellow employee to which (as the law then stood) the doctrine of common employment afforded the employers a complete defence. But I think the same ratio decidendi must be taken to apply where the performance of the employer's duty has been entrusted to an independent contractor. This seems to me to be implicit in the passage from *Bain* v. *Fife Coal Co.*,[4] cited with approval by Lord Thankerton and also expressly commended by Lords Atkin, Macmillan and Maugham.[5] From the complete citation I need take only this concluding passage: "The duty may not be absolute, and may be only a duty to "exercise due care, but, if, in fact, the master entrusts the duty "to someone else instead of performing it himself, he is liable "for injury caused through the want of care of that someone else, "as being, in the eye of the law, his own negligence."

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[2] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.

[3] [1938] A.C. 57.

I should add the following citations from the speeches in the *Wilsons & Clyde Coal Co.'s* case.[6] Lord Macmillan said: "Now "I take it to be settled law that the provision of a safe system "of working in a colliery is an obligation of the owner of the "colliery. He cannot divest himself of this duty, though he "may—and, if it involves a technical management and he is not "himself technically qualified, must—perform it through the "agency of an employee. It remains the owner's obligation, "and the agent whom the owner appoints to perform it performs "it on the owner's behalf. The owner remains vicariously "responsible for the negligence of the person whom he has "appointed to perform his obligation for him, and cannot escape "liability by merely proving that he has appointed a competent "agent. If the owner's duty has not been performed, no matter "how competent the agent selected by the owner to perform it "for him, the owner is responsible."

Lord Wright said[7]: "In *Rudd's* case[8] the Court of Appeal, "applying their general views which I have just stated, held that "the employers could escape liability by showing that they had "appointed competent servants to see that the duty was fulfilled. "This House held that, on the contrary, the statutory duty was "personal to the employer, in this sense that he was bound to

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[4] 1935 S.C. 681, 693.
[5] [1938] A.C. 62, 73, 76, 87.
[6] Ibid. 75.
[7] Ibid. 78.
[8] [1933] 1 K.B. 566; 49 T.L.R. 202.

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"perform it by himself or by his servants. The same principle, "in my opinion, applies to those fundamental obligations of a "contract of employment which lie outside the doctrine of "common employment, and for the performance of which "employers are absolutely responsible. When I use the word "absolutely, I do not mean that employers warrant the adequacy "of the plant, or the competence of fellow-employees, or the "propriety of the system of work. The obligation is fulfilled by "the exercise of due care and skill." And later [9]: "If I may "take an analogy or instance of a similar personal obligation, I "note that the Carriage of Goods by Sea Act, 1924, requires a "shipowner to exercise due diligence or to take reasonable care "to provide a seaworthy ship. The shipowner is almost certainly "not an expert naval architect, engineer, or stevedore. So far "as I know it has never been claimed that this obligation is "fulfilled by the shipowner taking reasonable care to appoint a "competent expert; the shipowner is absolutely held to the "fulfilment of the obligation. It is the obligation which is "personal to him, and not the performance."

Lord Maugham said [10]: "We now come to the real point in "the present case, which may be stated thus: Admitting that "the employer was liable to provide a reasonably safe system of "working the colliery, was not this a liability which he could "delegate to skilled persons with the consequence that his "personal liability would be discharged? It must, I think, be "admitted that in England the early authorities on this point "were not very clear. In Scotland it was not so. The admirable "opinions of the Lord Justice-Clerk in *Bain* v. *Fife Coal Co.*,[11] "and of the Lord President in the present case, establish in my "view that there has been a long and uniform practice in "Scotland, repeatedly approved in this House, to the effect that "an employer cannot divest himself of responsibility in regard "to the three matters which are in his peculiar province." Also on the same page he said: "It has already been pointed out that "the employers' liability is discharged by the exercise of due "care and skill; and I may be allowed to point out that it is this "circumstance which has led on occasion to a misapprehension "of the true position. An illustration will demonstrate the "mistake. Suppose some new machinery is necessary in a "factory, and the employer is absent or completely unskilled in "such things. He necessarily leaves the matter to a manager,

[9] [1938] A.C. 57, 80.

[10] Ibid. 87.

[11] 1935 S.C. 681.

"let us suppose a highly skilled person, who, however, is "negligent in this case. An accident follows, due to a defect "in the machine. If the liability of the employer is stated as "being an obligation to use his best endeavours to supply and "instal good machinery, it may well be said on his behalf that "he left the matter to a highly skilled man, and it may be asked "with force, what more could he do? I should reply, nothing; "but I should add that the premise is incorrect. The possessive "pronoun 'his' is that which leads to the error. The proposition "would be more correctly stated to be that his duty is to supply "and instal proper machinery so far as care and skill can secure "this result. He can, and often he must, perform this duty by "the employment of an agent who acts on his behalf; but he "then remains liable to the employees unless the agent has "himself used due care and skill in carrying out the employer's "duty. This has sometimes been expressed by saying that the "duty is personal to the employer; but the adjective if unexplained is apt to mislead, like the word 'absolute' and the "word 'delegate.' The employer can, of course, and frequently "must delegate the performance of any of his duties to skilled "agents; but it would need an altogether new implied term in "the contract between employer and employee before a court "could properly hold that this delegation has the result of freeing "the employer from his liability. This becomes apparent if we "imagine the contract between employer and workman to be "written out in full with all the implied clauses. There would "be, for the reasons given by the Lord Justice-Clerk in *Bain* v. "*Fife Coal Co.*,[12] and by your Lordships, no clause to the effect "that the employer was to be freed from his special obligations "to the workmen if he delegated them to an agent; and in the "absence of such a clause the employer would plainly remain "liable if the agent was guilty of not using proper care and skill, "since in the contract law of Scotland as in England it is impossible to get rid of a liability towards the other party to the "contract without the consent of that party."

I think these citations taken together point strongly to the conclusion that their Lordships would have drawn no distinction for the present purpose between a servant or agent (in the strict sense) of the employer and an independent contractor engaged by the employer. But the matter does not rest there. In *Thomson* v. *Cremin*[13] the House had to consider the position

[12] 1935 S.C. 681.

[13] [1956] 1 W.L.R. 103n.; [1953] 2 All E.R. 1185.

of an invitor who had entrusted to an independent contractor the performance of certain work, the proper performance of which was essential to the safety of the premises (in this instance the hold of a ship) which the invitee had to enter in the course of his work. The duty of the invitor was taken as being a duty to take reasonable care for the safety of the invitee; and Lord Simon said [14]: "The shipowner's responsibility for "the safety of the structure is not, indeed, absolute, but, on the "principle of *Indermaur* v. *Dames*,[15] he owes to the invitee a "duty of adequate care. If adequate care was not exercised in "fitting and securing the shore, it would be no answer (as the "appellant's counsel candidly admitted) to say that the ship-"owner employed an independent contractor at Fremantle to do "the work. For this last proposition, reference may usefully be "made to a recent decision of the Court of Appeal in *Wilkinson* "v. *Rea Ltd.*,[16] and especially to the observations of Luxmoore "L.J. I can see no ground for drawing a distinction between "the permanent structure of the ship and the temporary erections "put up in her holds for the purpose of the special cargo she was "carrying."

Lord Wright said [17]: "That the first respondent was working "on the appellant's premises, the steamship *Sithonia*, as an "invitee and not as a mere licensee has not been questioned. "Thus the case fell within the general rule enunciated in "*Indermaur* v. *Dames*.[18] The rule there laid down as to the "duty of the invitor to the invitee has been affirmed in several "decisions of this House, whether the particular case was held "to fall within or without the rule. In the present appeal, "however, the failure to exercise due care for the safety of the "invitee which has been found was due, not to the negligence "of the appellant or his servants, but to that of independent "contractors, the Australian shipwrights who constructed the "shifting-boards before the grain was loaded. I agree with the "Lord Chancellor in his approval of the decision of the Court "of Appeal in *Wilkinson* v. *Rea Ltd.*,[19] where it was held by "Luxmoore L.J., with whom MacKinnon L.J. concurred, that "the invitor was not excused for a failure to perform his duty "to the invitee merely because he had entrusted performance to

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[14] [1956] 1 W.L.R. 103n., 106.

[15] (1866) L.R. 1 C.P. 274; affirmed (1867) L.R. 2 C.P. 311.

[16] [1941] 1 K.B. 688, 700–702; [1941] 2 All E.R. 50.

[17] [1956] 1 W.L.R. 103n., 109.

[18] L.R. 1 C.P. 274; affirmed L.R. 2 C.P. 311.

[19] [1941] 1 K.B. 658.

"another. Luxmoore L.J. adopted the view of Williams J. in "*Pickard* v. *Smith*.[20] The duty of the invitor towards the "invitee is, in my opinion, a duty personal to the former, in "the sense that he does not get rid of the obligation by "entrusting its performance to independent contractors. It is "true that the invitor is not an insurer: he warrants, however, "that due care and skill to make the premises reasonably safe "for the invitee have been exercised, whether by himself, his "servants, or agents or by independent contractors whom he "employs to perform his duty. He does not fulfil the warranty "merely by leaving the work to contractors, however reputable "or generally competent. His warranty is broken if they fail to "exercise the proper care and skill. This is only an instance of "the general rule which was stated by Lord Blackburn in another "connexion in *Dalton* v. *Henry Angus & Co.*,[21] where he "distinguished the case of what has been called the collateral "negligence of a sub-contractor from their negligence in failing "to perform a duty resting on the principal himself 'who cannot "'escape from the responsibility attaching to him of seeing that "'duty performed by delegating it to a contractor.' Lord "Blackburn again enunciated the same principle in *Hughes* v. "*Percival*.[22] More recently this House, again in a different "context of fact, applied this rule in *Wilsons & Clyde Coal Co.* "*Ltd.* v. *English*.[23] It is always a question of the extent of the "duty incurred. In the present case, the invitee is not concerned "with the course which the invitor adopts by way of discharging "the duty. He is entitled when he comes on the invitor's "premises, to rely on the warranty that the invitor's duty to him "has been performed and to complain if he is injured because "the duty has not been properly performed."

I would respectfully adopt this comment [24] made by Ashworth J. on *Thomson* v. *Cremin* [25]: "It is true that Lord Wright is "there dealing with the position of an invitor, but the duty of "an employer to his workmen is certainly no less. Indeed, in "*London Graving Dock Co. Ltd.* v. *Horton* [26] Lord Porter said "'admittedly the duty of a master to his servant is higher than "'that of an invitor to his invitee.'"

As was recognized in *Wilsons & Clyde Coal Co. Ltd.* v. *English* [27] (itself a Scottish case) the Scottish law on this question

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[20] (1861) 10 C.B.N.S. 470.
[21] (1880) 6 App.Cas. 740, 829.
[22] (1883) 8 App.Cas. 443, 446.
[23] [1938] A.C. 57.
[24] [1957] 2 Q.B. 368, 378.
[25] [1956] 1 W.L.R. 103n.
[26] [1951] A.C. 737, 746; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.
[27] [1938] A.C. 57.

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is the same as English law. In addition to the passage from *Bain* v. *Fife Coal Co.*[28] cited above, we were referred to a number of Scotch decisions, including *Macdonald* v. *Wyllie.*[29] In that case a firm of builders having a contract to take down certain high walls contracted with a firm of joiners for the erection of a scaffold, which after it had been taken over by the builders collapsed. It was admitted that the fall of the scaffold was due to a defect which might have been discovered by any skilled person inspecting it. A workman in the employment of the builders was injured by the fall of the scaffold, and brought an action for damages against the builders.

The action was tried with a jury, and the Lord Justice-Clerk directed the jury as follows[30]: "That if the jury are satisfied "that the defender, not having the knowledge and skill to erect "the scaffolding in question, selected a tradesman having skill "and experience of such work, and contracted with him to "provide such a scaffold, he would not be liable as for fault if "the scaffolding fell in consequence of its being erected in an "unskilful manner through the fault of the skilled person who "contracted to erect it."

On a bill of exceptions, it was held that this direction was erroneous in law. Lord Young said[31]: "This bill of exceptions "comes before us on the footing that the scaffolding was defec-"tive and dangerous. It is admitted that for the purposes of "this discussion that must be conceded, and it is stated by the "learned judge who tried the case that it was upon that "supposition that the ruling now in question was given by him, "and also that it was given upon the further supposition that the "defect was not a latent defect, but one which could have been "discovered by a proper inspection by a reasonably skilled person. "Therefore the question of latent defect does not arise here. "The ruling was asked and given on the footing that the "scaffolding was defective and dangerous, and that the defect "was not latent. Accordingly, the learned judge who tried the "case, in accordance with the defence put forward by the "defenders, gave this direction [his Lordship read the Lord "Justice-Clerk's direction]. This ruling was given on the "assumption that the joiner employed by the defenders was a "properly skilled person. The direction given practically "amounts to this, that the defenders discharged their whole duty "to the pursuer by entrusting the erection of the scaffolding to

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[28] 1935 S.C. 681.

[29] (1898) 1 Fraser 339.

[30] Ibid. 340.

[31] Ibid. 343.

"a properly skilled joiner, and that, however unskilfully that "joiner might erect the scaffolding, the defenders would not be "liable in consequence to the pursuer. We have now to determine whether this ruling is in accordance with the law of "Scotland. I am of opinion that it is not."

He further said [32]: "The basis of the workman's claim against "his master is that there is a responsibility on the part of his "employer for the scaffolding being in a reasonably safe condition "to enable the workman to perform the work which he has been "engaged to do. It is no answer to him for the master to say, "'I am not a joiner and I employed a skilled joiner to do the "'work for me.' It is no more an answer for him to say so to "his workman, than it would be an answer for a person who had "erected a scaffolding for people to see a procession, to one of "the persons who had engaged a seat upon it, and who had been "injured through a defect in it, to say to that person that he "himself was not a competent joiner, that he had employed a "fit joiner to erect the scaffolding, and that he was not "responsible for the joiner's fault."

Lord Trayner said [33]: "If a master buys a machine, let us "say, necessary for the execution of his work, and gives it to his "workman, it is the master's machine, not the workman's or "manufacturer's. If the machine turns out to be faulty, defec-"tive, or otherwise insufficient, the master must answer for it. "He may have his relief against the maker or manufacturer, "but the injured workman has no claim against the maker of "the machine; there was no contractual or other relation "between them; the maker of the machine had no duty towards "the workman. When the scaffolding or the machine passes "out of the hands of the man who erected or made it, it becomes "the scaffolding or the machine of the man who ordered it and "gave it to his workman. It is the master's scaffolding or "machine, although erected or made per alium, and he is directly "responsible for its insufficiency.

"The rule that a person is not responsible for damage done "through the neglect or fault of an independent contractor does "not apply to a case like this. It applies in cases where there "is no relation between the person injured and the person who "employs or engages with the contractor. But 'the case is "'wholly different where a distinct duty is imposed upon the "'person sued towards the person injured, and where the duty "'has not been performed'—(*per* Lord Justice-Clerk Moncreiff

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[32] 1 Fraser 339, 344.

[33] Ibid. 345.

"in *Stephen's* case[34]). That correctly represents the case now "before us.

"It was argued by the defenders that they were not responsible for defects in their appliances which were latent, and "that their duty was limited to supplying the workman with "appliances which were reasonably sufficient. I am not prepared to admit the soundness of this argument to the extent "to which it was carried by the defenders. But it is not a point "raised for decision by the exception before us. The charge "excepted to is absolute, and neither states nor suggests any "limitation in the direction to which the defenders' argument "points. I therefore give no opinion upon the question so "raised."

Lord Moncreiff said[35]: "So viewed, I am of the opinion that "the direction is not exhaustive, and that therefore it is defective. As it stands the jury may have supposed that the "defenders sufficiently discharged their duty to their servants by "entrusting the construction of the scaffold to a competent "joiner. In order to make the direction complete I think his "Lordship should have added the words 'unless by the exercise "'of reasonable care the defenders could have discovered the "'insufficiency of the scaffold,' or words to that effect.

"A master is bound to supply safe and sufficient plant for the "use of his workmen, but he is not bound to warrant the "sufficiency of the plant. He is not personally bound to make it "or to keep it in repair. He is only bound in a question with his "servant to take reasonable care that it is sufficient; and in "order to render him liable there must be proof of fault or "negligence on his part or those for whom he is responsible.

"In judging whether an employer has or has not used "reasonable care regard must be had to the whole circumstances "of each case. The fact that he has entrusted the manufacture "or construction of the plant to a skilled tradesman under an "independent contract will go far to establish that he had "taken reasonable care. But of itself it is not necessarily "sufficient, because if he could on inspection have discovered the "defect he will not be freed from liability. It is for the jury to "decide in each case what is reasonable care and what defects are "to be considered latent in a question with the employer."

Finally, the Lord Justice-Clerk, who had given the direction under consideration, said this[36]: "But having now heard a full

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[34] 3 Rettie 535, 540.

[35] 1 Fraser 339, 346.

[36] Ibid. 346, 347.

"debate and citation of authorities upon the point I have come "to be of opinion that the direction which I gave to the jury "was erroneous in respect that it was incomplete. I think it "was right as far as it went, but that I should have added "some words to the same effect as the addition suggested by "Lord Moncreiff in his opinion. In this connexion, questions of "latent defect often present considerable difficulty. A defect "might be latent to one person and not latent to another who "was highly skilled."

The case is important in that the firm who provided the faulty scaffolding were undoubtedly independent contractors.

The members of the court were not entirely at one, but I think it can fairly be said that none of them regarded the fact that the employers had entrusted the erection of the scaffolding to skilled independent contractors as sufficient in itself to discharge the employers' duty to their workmen. Lords Young and Trayner seem to have been clearly of opinion that employers cannot be held to have discharged their duty to a workman by the employment of skilled independent contractors if the contractors do their work negligently and damage to the workman results, with a possible exception in favour of the employers where the defect which does the damage is latent. Lord Moncreiff and the Lord Justice-Clerk on the other hand thought that the employers' duty would be discharged by the employment of skilled independent contractors, unless by the exercise of reasonable care the employers could have discovered the insufficiency of the scaffold. Lord Moncreiff regarded the question whether an employer has or has not used reasonable care as depending on the circumstances of each case, but thought that the fact that an employer had entrusted the relevant work to a skilled independent contractor would go far to establish that he had used reasonable care, but was not necessarily of itself sufficient to do so, because if he could on inspection have discovered the defect he would not be free from liability. Lord Moncreiff and the Lord Justice-Clerk appear, in effect, not only to have admitted an exception in favour of the employer in respect of latent defects in the independent contractor's work, but to have regarded a latent defect as a defect not discoverable *by the employer* on reasonable inspection. That is, of course, a view far more favourable to the employer than the alternative conception of a latent defect as a defect not discoverable by the use of reasonable skill and care on the part of the independent contractor. I will later return to this important aspect of the matter. But so far as the effect of the employment of an independent contractor is concerned, I do not think *Macdonald* v. *Wyllie* [37] can be regarded as authority for the proposition that the entrusting of the relevant work to a skilled independent contractor in itself discharges an employer's duty of care to his workmen.

To revert to English cases, in *Naismith* v. *London Film Productions Ltd.*,[38] Lord Maugham's definition of an employer's duty to his employee was expressly adopted by Sir Wilfrid Greene M.R. in this court. The Master of the Rolls said [39]: "The law "on this point has recently been laid down by the House of "Lords in the case of *Wilsons & Clyde Coal Co. Ltd.* v. "*English*,[40] and for present purposes I can take the very concise "statement of Lord Maugham [41]: 'The proposition would be "'more correctly stated to be that his duty is to supply and "'instal proper machinery so far as care and skill can secure "'this result.'" MacKinnon L.J. said [42]: "Such standard of "duty is explained by *Wilsons & Clyde Coal Co. Ltd.* v. *English* "to which Sir Wilfrid Greene M.R. has referred." Goddard L.J. referred [43] to the *Wilsons & Clyde Coal Co.'s* case as having "done so much to clarify the law on that point," and continued: "The relationship of the parties was not that of invitor and "invitee, but that of employer and employee, and it follows that "the jury should have been directed that the defendants' duty "was not merely to warn against unusual dangers known to "them, and not to the plaintiff, but also to make the place of "employment, and the plant and material used, as safe as the "exercise of reasonable skill and care would permit." I think that MacKinnon and Goddard L.JJ. must be taken to have had in mind the particular passage from the speech of Lord Maugham which the Master of the Rolls had just cited.

In *Paine* v. *Colne Valley Electricity Supply Ltd.*[44] Goddard L.J., sitting as a judge of first instance, said: "It follows, in "my opinion, not only that there had been a breach of the "Factory and Workshop Act, 1901, but that the first defen"dants had failed to provide a safe place for their workmen "and had therefore committed a breach of their common law "duty as recently laid down in *Wilsons & Clyde Coal Co. Ltd.* v.

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[37] 1 Fraser 347.

[38] [1939] W.N. 86; [1939] 1 All E.R. 794

[39] [1939] 1 All E.R. 794, 796.

[40] [1938] A.C. 57.

[41] Ibid. 88.

[42] [1939] 1 All E.R. 794, 797.

[43] Ibid.

[44] (1938) 55 T.L.R. 181, 183; [1938] 4 All E.R. 803.

"*English*.[45] This is a duty which cannot be avoided by delegation. It is no answer to say, as counsel for the first defendants submitted: 'We employed competent contractors to provide 'a safe place or plant.' The class of cases in which the employment of a competent contractor affords a defence belongs to a wholly different category in the law of negligence. I have no hesitation in holding that the first defendants have no defence whatever to the plaintiff's claim."

It is right to note that on the facts of that case it seems reasonably plain that the defect in the electrical apparatus which brought about the death of the employee could have been discovered by the employers on reasonable inspection. But Goddard L.J. was clearly of opinion that the fact that the employers had entrusted the provision of the plant in question to reputable independent contractors afforded the employers no defence to a claim based on breach of their duty of reasonable care, and in the present state of the authorities I think this must be taken to be the law.

But, it is said, that is not this case. Here the first defendants did not cause the defective drift to be made to their order by the second defendants. They bought it ready made from the suppliers, against whom no negligence is alleged. Here at least, it is claimed, a line should be drawn; and the first defendants should not be saddled with responsibility for a defect in the drift which they could not reasonably have been expected to detect, and which was due to negligence on the part of manufacturers, the second defendants, with whom the first defendants were never in contractual privity, and whom the first defendants had never in any sense entrusted with the performance of their duty to take reasonable care to provide their employees with safe tools.

I cannot accept this argument. The first defendants, when they set about the provision of drifts, must be taken to have been alive to their duty to take reasonable care to provide sound drifts. If they were alive to that duty they must, in purchasing the drifts of which the defective drift was one, be taken to have assumed that reputable suppliers such as Baldwin & Co. Ltd., from whom they purchased the drifts, would have obtained them from reputable manufacturers who could be relied on as having exercised due skill and care in their manufacture. In other words, the first defendants must be taken to have relied on the reputation of Baldwin & Co. Ltd. as a sufficient assurance that in providing their employees with drifts purchased from Baldwin & Co. Ltd. they would be providing them with drifts made with reasonable care and skill, and thus performing their duty of taking reasonable care to provide their employees with sound drifts.

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[45] [1938] A.C. 57.

But if the duty is as Lord Wright said in the *Wilsons & Clyde Coal Co.'s* case [46] a duty "personal to the employer and one to be "performed by the employer per se or per alios," or if the duty is, as Lord Maugham termed it in the same case,[47] a duty "to supply" sound tools "so far as care and skill can secure "this result," I do not see how reliance on Baldwin & Co. Ltd., or on their manufacturers, for the soundness of the drifts could amount to performance of the duty, if the manufacturers actually concerned, namely, the second defendants, had in fact failed to use reasonable care and skill in the making of them.

If the law was, as it might quite reasonably be, that an employer discharged his duty of taking reasonable care to provide sound tools by having them made by a reputable manufacturer or buying them ready made from reputable suppliers, the first defendants here could no doubt repel the charge of negligence now brought against them by showing that they bought the drift which turned out defective from reputable suppliers, and that the defect was not one which they could have discovered by reasonable inspection.

But the law as it is does not, as I understand it, accept reliance on the care and skill of others as a performance of the duty. Therefore (to apply Lord Wright's language), the first defendants did not, in buying the drift from Baldwin & Co. Ltd., perform the duty per se; nor did they perform it per alios, since the second defendants unfortunately failed to take reasonable care in the making of the drift. Nor (to apply Lord Maugham's language) did the first defendants provide, in the shape of the defective drift, a sound drift so far as care and skill could secure this result; for due care and skill were not in fact exercised in the manufacture of this drift.

The argument for the first defendants is based on the broad propositions that there should be no responsibility without fault, and that an employer's duty to his workmen is not an absolute duty, but only a duty to take reasonable care. It is said that the judge's decision in favour of the plaintiff can only be justified either (a) on the ground that the first defendants were vicariously responsible for the second defendants' negligence, or (b) on the

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[46] [1938] A.C. 57, 80.

[47] Ibid. 88.

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ground that the plaintiff's contract with the first defendants included a warranty by the first defendants to the effect that the tools provided for him by the first defendants would be sound tools. As to the former ground, it is pointed out that this can only be appropriate where an employer has entrusted the performance of his duty to a servant or agent, and that servant or agent has negligently failed to perform it. Even if " agent " for this purpose can properly be regarded as including an independent contractor, it cannot possibly be retrospectively extended to a manufacturer making for the market tools which ultimately find their way into the hands of an employer through some supplier with whom he may happen to deal. As to the latter ground, the warranty imputed to the first defendants could only be a warranty that reasonable care had been taken by the first defendants, their servants or agents. But there was no lack of reasonable care on the part of the first defendants themselves, or on the part of Baldwin & Co. Ltd., if they can properly be termed the first defendants' agents. As to the second defendants, who were admittedly negligent, they were never in any sense the first defendants' agents, and accordingly the warranty could not extend to their acts or defaults. The argument goes on to point out the inconsistency between the view that an employer is to be responsible on the basis of warranty for the failure of persons over whom he has no control to take reasonable care in the manufacture of goods which he buys in the market, and the authorities to the effect that an employer is not in general responsible to his workmen for the safety of premises of third parties, which proceed on the ground that the employer has no control over those premises. In this connexion reference was made to *Taylor* v. *Sims & Sims* [48] and *Cilia* v. *James & Sons*,[49] and also to *Hodgson* v. *British Arc Welding Co. Ltd.*,[50] where employers (specialist sub-contractors) were held not to be liable at common law for injuries to their workmen through a defect in scaffolding provided, maintained and controlled by the head contractors for the repair of a ship.

An authority directly in the first defendants' favour is to be found in *Mason* v. *Williams & Williams Ltd.*,[51] where in circumstances closely comparable to those of the present case Finnemore J. held that certain employers were not liable to their workman for an injury to his eye caused by the breaking of a defective chisel. Ashworth J. found himself unable to follow that case in view of the other authorities, but the first defendants claim that he ought to have followed it as containing a correct statement of the law.

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[48] [1942] W.N. 124; 58 T.L.R. 339; [1942] 2 All E.R. 375.

[49] [1954] 1 W.L.R. 721; [1954] 2 All E.R. 9.

[50] [1946] K.B. 302; 62 T.L.R. 275; [1946] 1 All E.R. 95.

[51] [1955] 1 W.L.R. 549; [1955] 1 All E.R. 808.

As to *Wilsons & Clyde Coal Co.* v. *English*,[52] it is said on the first defendants' side that in so far as the speeches contain language capable of carrying the implication that an employer cannot divest himself of his duty by entrusting its performance to an independent contractor, and in particular in so far as the speech of Lord Maugham contains language capable of being construed as supporting the view that an employer who buys tools from a reputable supplier is answerable for defects in them due to the negligence of the manufacturer by whom they may turn out to have been made, albeit a complete stranger to the employer, they go far beyond what was necessary for the decision of the actual case in hand, and accordingly should not be regarded as providing binding authority for the extreme proposition contended for by the plaintiff.

As to this last point, I think it was necessary for the decision of the matter in question in *Wilsons & Clyde Coal Co. Ltd.* v. *English*[52] for their Lordships to examine the character and incidents of an employer's duty of care to his workmen, and in particular the question whether it could be discharged by entrusting its performance to others, and I think what was said by them on that question must be regarded as authoritative.

As to the alleged inconsistency of the plaintiff's proposition with the cases concerning work on the premises of third parties, I doubt if it would ever be possible to reconcile all the cases which have been decided on an employer's duty to his workmen at common law, and each case depends to a great extent on its own facts. But I do not think this particular charge of inconsistency is well founded. Where a workman is put by his employer to work on premises belonging to third parties the employer in no sense provides or selects or controls the premises. In cases such as the present case the employer decides what tools he will buy and from whom he will buy them.

As to the impossibility of imputing to the first defendants vicarious liability for the negligence of the second defendants, who were neither their servants nor their agents nor their independent contractors, to this, as a general proposition, I agree. But I do not think that the principle upon which an employer is held not to have performed his duty of care, where he has

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[52] [1938] A.C. 57.

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entrusted its performance to somebody else who has in fact failed to perform it, is confined in its application to cases in which the employer is vicariously liable for that other person's negligence in the sense in which a principal may be held liable for the negligence of his agent. Nor in my view can there be any valid distinction for this purpose between an employer who has tools made for him by a manufacturer thereby entrusting to the manufacturer the performance of his duty to take reasonable care to provide sound tools, and an employer who buys tools ready made on the assumption that they have been made with that degree of skill and care which the performance of his duty demands.

As to the terms of any implied warranty, a verbal point can no doubt be made. But I think the case really turns on the nature of the first defendants' duty of reasonable care and the manner in which it is capable of being discharged. As I understand the *Wilsons & Clyde Coal Co.'s* case,[52] it is an absolute duty to take reasonable care which can be discharged only by showing that all reasonable care has in fact been taken to ensure the soundness of the tools provided, and not by showing that the employer entrusted to somebody else the taking of all reasonable care, or assumed that somebody else had taken all reasonable care, to ensure the soundness of those tools. If the duty must be expressed as a warranty, I think the warranty would be that (to paraphrase Lord Maugham's language in the *Wilsons & Clyde Coal Co.'s* case [52]) the tools were as sound as reasonable care could make them.

I have left to the last the question of latent defect. The first defendants' duty being to take reasonable care, they clearly could not be held liable if the defect could not have been detected either by the first defendants themselves on such inspection as they could reasonably be expected to make or by the second defendants using reasonable skill and care in the manufacture of the tool. But the judge, while holding that the first defendants could not have been reasonably expected to discover the defect, found that the second defendants could by the exercise of reasonable skill and care have discovered it, and were negligent in failing to do so. The defect may thus be said to have been latent quoad the first defendants, but it was clearly not latent quoad the second defendants, the manufacturers of the tool. Therefore reasonable care was not in fact taken by the second defendants in the manufacture of the tool, and it follows that the first defendants' duty of care, as I have endeavoured to define it above, was in fact not performed, and it is immaterial that the defect may be said to have been latent quoad the first defendants themselves.

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[52] [1938] A.C. 57.

My conclusion as to the law on this point, and indeed on the whole case, is strongly borne out by the Scottish case of *Donnelly* v. *Glasgow Corporation*.[53] In that case the plaintiffs were employed by the defendant corporation as driver and conductor of an omnibus, and they claimed damages from the corporation in respect of personal injuries which they had sustained due to a defect in the chassis of the omnibus. The case came before the court on an application by the plaintiffs in which they attacked the relevance of certain defences raised by the corporation. The Lord Justice-Clerk (Lord Thomson) said this[54]: "The main "defence put forward by the corporation is that this defect was "a defect of design for the non-discovery of which they cannot "be blamed as they relied and were entitled to rely first on the "manufacturers of the chassis, and second on the circumstance "that they had been issued with a certificate of fitness under "section 68 of the Road Traffic Act, 1930 (20 & 21 Geo. 5, "c. 43), applicable to this omnibus. So far as the driver's and "conductor's cases are concerned, they both being servants of "the corporation, I have no doubt that the defences are "irrelevant. It is admitted by the corporation that the "omnibus was defective and they aver that their suppliers were "responsible for the defective condition. But on this branch of "the law a master cannot escape liability to his servant for "defective plant by blaming his agents. The personal responsibility which the law lays on the master in respect of plant "covers the activities of any person whom the master employs "to provide that plant. The supplier and the master are as one. "If then the supplier erred, the master is saddled with the results "of that error. It may be that the master is able to have "recourse against the supplier on account of his error, but that "is no concern of the injured servant and, indeed, one of the "reasons behind the development of this branch of the law is to "give the workman the advantage of being able to go directly "against his master. Of course, the master does not warrant "the plant and he is not liable in the case when the defect is "latent in the sense that it was not discoverable by the exercise "of reasonable care. If the position in the present case had been "that the corporation had been able to say that neither they,

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[53] 1953 S.C. 107; 1953 S.L.T. 161.

[54] 1953 S.L.T. 161, 168.

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"nor their suppliers, could have discovered the defect by means "of any reasonable inspection, the defence would be relevant. "But, as I have already said, the corporation agree that the "defect was patent to their suppliers and that in this branch of "the law means that it was patent to them."

Those observations, while not binding upon us, are of great persuasive force, and they substantially accord with what I take to be the law on this subject as deducible from the English authorities.

It may be said with some force that the conclusion to which I think we should come places upon the employer a heavier burden than the broad principle of reasonable care enunciated by Lord Herschell in *Smith* v. *Baker* [55] would appear to involve according to the ordinary meaning of the language used. But I think it is a conclusion which this court is constrained on the authorities to adopt. I would, moreover, observe that it does not entail the substitution of an absolute duty to ensure safety for the duty of reasonable care enunciated in *Smith* v. *Baker*,[56] and accepted passim by the House of Lords in the *Wilsons & Clyde Coal Co.'s* case.[57] The duty remains a duty of reasonable care, but the obligation to take that degree of care per se or per alios is an absolute obligation.

As to the merits of this conclusion, while it may be said to bear somewhat hardly on the employer, on the other hand an employee has to use the tools provided by the employer and has no voice in the selection of the tools or as to the manufacturer or supplier from whom they are obtained. If he is injured through a defect in one of the tools provided by his employer, it is surely not unreasonable that the employer should be held liable if the defect was due to the negligent manufacture of the tool, whether by the employer himself or by somebody else. Otherwise the employee might well be without remedy. He would not know and might not be able to find out who the manufacturer was. If he could find out who the manufacturer was, he might have a good claim on the *Donoghue* v. *Stevenson* [58] principle. But claims of that kind are not always easy to make out, though in the present case the plaintiff did in fact succeed against the second defendants on that principle, as well as succeeding against the first defendants for breach of their common law duty as his employers.

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[55] [1891] A.C. 325, 362; 7 T.L.R. 679.

[56] [1891] A.C. 325, 362.

[57] [1938] A.C. 57.

[58] [1932] A.C. 562; 48 T.L.R. 494.

At all events, it would, as I think, be an irrational and intolerable refinement to distinguish for this purpose between tools made by a manufacturer to the order of the employer and tools bought by the employer ready made.

For the reasons I have endeavoured to state, I agree with the conclusion reached by the judge and would, for my part, dismiss this appeal.

Parker L.J. With reluctance and diffidence I feel constrained to take a different view from that which my Lord has expressed and I would allow this appeal.

The duty owed by a master to his servant at common law can be stated in general terms as a duty to take reasonable care for the safety of his servants. It is as Lord Herschell said in *Smith* v. *Baker*[59]: " . . . the duty of taking reasonable care to provide "proper appliances, and to maintain them in a proper condition, "and so to carry on his operations as not to subject those "employed by him to unnecessary risk." Even before the Employers' Liability Act, 1880, it was regarded as a personal duty in this sense that if the master delegates, as he often must, the performance of that duty to another he remains liable for the failure of that other to exercise reasonable care. In *Bain* v. *Fife Coal Co.*,[60] the Lord Justice-Clerk, after referring to the decision of this court in *Fanton* v. *Denville*,[61] said this: "It "ignores what has always been regarded as a fundamental "doctrine of the law of master and servant, viz., that there are "certain duties owed by a master to his servant so imperative "and vital to safety that the master cannot divest himself of "responsibility by entrusting their performance to others, so as "to avoid liability in the event of injury arising to the servant "through neglect of any of these duties. The master's liability "as for breach of these paramount duties is unaffected by the "doctrine of fellow-servant, for in the eye of the law they are "duties that cannot be delegated. If, in fact, they are entrusted "by the master to others, the maxim applies qui facit per alium "facit per se. The duty may not be absolute, and may be only "a duty to exercise due care, but, if, in fact, the master entrusts "the duty to someone else instead of performing it himself, he is "liable for injury caused through the want of care of that some-"one else, as being, in the eye of the law, his own negligence." I have quoted that statement since it was expressly approved by all their Lordships in *Wilsons & Clyde Coal Co. Ltd.* v. *English*[62] as representing the law of England as well as of Scotland. See also the principle as enunciated in that case by Lord Thankerton, Lord Macmillan, Lord Wright and Lord Maugham.[63]

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[59] [1891] A.C. 325, 362.

[60] 1935 S.C. 681, 693.

[61] [1932] 2 K.B. 309; 48 T.L.R. 433.

Further, it is, I think, clear that this principle holds good whether the person employed by the master is a servant, a full-time agent or an independent contractor. It is true that in *Wilsons'* case the person under consideration was a manager employed by the owner of a mine, but all that was said there is equally applicable to the case of an independent contractor. Indeed, Lord Wright[64] gave as an illustration the case of a shipowner who employed an expert naval architect, engineer or stevedore to make his ship seaworthy—persons who in general would be independent contractors.

Further, in *Paine* v. *Colne Valley Electricity Supply Co. Ltd.*,[65] Goddard L.J., sitting as an additional judge of the King's Bench Division, expressly included independent contractors as within the principle.

Again, in *Thomson* v. *Cremin*,[66] the defendant was held liable for the negligence of independent contractors employed to perform the duty. It is true that that was a case of invitor and invitee, but the duty of a master to his servant is certainly no less than that of an invitor to his invitee.

The principle is, I think, clear, but difficulties at once arise when it is sought to apply it in the present case. Is it to be said that in ordering a standard tool from Baldwin Ltd., wholesale suppliers, they were delegating a duty owed to the plaintiff or were employing Baldwins to perform their duty, or were appointing Baldwins their agents in that regard, to employ phrases often used in the cases? I cannot believe that the matter can be looked at in this way when there is nothing more than the purchase and sale of a standard article, and this whether the seller is a distributor or the manufacturer. Of course, if the defendants purchased the tool from suppliers or manufacturers whom they had reason to believe were unreliable, or if the defect was patent to the defendants or one which they ought to have suspected, the position might be different. It would then be a question of fact whether in all the circumstances they had failed to exercise reasonable care. No consideration of this kind, however, arises here.

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[62] [1938] A.C. 57.
[63] Ibid. 70, 75, 80, 83–84, 88.
[64] Ibid. 80.
[65] 55 T.L.R. 181.
[66] [1956] 1 W.L.R. 103n.

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But even if Baldwin Ltd. fell in some way to be considered as the defendants' agents, there is no suggestion that they were negligent. They, in turn, bought from reputable manufacturers, and had no reason to suspect any defect in the tool.

In these circumstances it seems to me that the plaintiff can only hold the defendants liable if the true duty of a master is not merely to take reasonable care to provide a reasonably safe tool, but to provide a tool which has been manufactured with reasonable skill and care, even when the manufacturer is in no contractual relationship with the master. Unless constrained to do so by authority I would be loth to hold that there was any such duty. Subject only to a defect latent to the manufacturer, and ordinarily this will not arise by reason of his expert knowledge, such a duty would amount to a warranty that the tool was safe. Indeed, such a duty would be one incapable of performance in that the master would have no control over the processes of the ultimate manufacturer. Viewed as a matter of contract I find it difficult to imply any such term. Viewed as a matter of tort it would be a retrograde step towards the theory of liability without negligence: cf. *Read* v. *J. Lyons & Co. Ltd.*[67] (*per* Lord Macmillan and *per* Lord Simonds).

What, then, is the position on the authorities? Oddly enough the question until recently has never fallen to be decided in England. In the recent case of *Mason* v. *Williams & Williams Ltd.*,[68] Finnemore J. decided that an employer who buys tools from reputable makers is entitled to assume that they are such as will be proper for their intended purpose. Apparently, however, no cases were referred to in argument.

Much reliance in the present case was put on two passages, one in the speech of Lord Maugham in *Wilsons'* case, and one in the speech of Lord Wright in *Thomson* v. *Cremin.*[69] In *Wilsons'* case Lord Maugham said[70]: "Suppose some new "machinery is necessary in a factory, and the employer is absent "or completely unskilled in such things. He necessarily leaves "the matter to a manager, let us suppose a highly skilled person, "who, however, is negligent in this case. An accident follows, "due to a defect in the machine. If the liability of the employer "is stated as being an obligation to use his best endeavours to "supply and instal good machinery, it may well be said on his "behalf that he left the matter to a highly skilled man, and it "may be asked with force, what more could he do? I should

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[67] [1947] A.C. 156, 170, 180; 62 T.L.R. 646; [1946] 2 All E.R. 471.

[68] [1955] 1 W.L.R. 549.

[69] [1956] 1 W.L.R. 103n.

[70] [1938] A.C. 57, 87.

"reply, nothing; but I should add that the premise is incorrect. "The possessive pronoun 'his' is that which leads to the error. "The proposition would be more correctly stated to be that his "duty is to supply and instal proper machinery so far as care "and skill can secure this result." Taken out of their context these words are no doubt wide enough to embrace the higher duty contended for, but I cannot bring myself to believe that Lord Maugham was intending to lay down such a duty. *Wilsons'* case concerned the manager of a mine; it decided that though an employer can, and often should, delegate his duty to servants, agents and even independent contractors, he remains liable for their negligence. The House was not considering the question which arises here, which is not a case of delegation. That Lord Maugham had no such question in mind is, I think, made clear by the words which follow the passage cited above. Lord Maugham goes on[71]: "He can, and often must, perform this "duty by the employment of an agent who acts on his behalf; "but he then remains liable to the employees unless the agent "has himself used due care and skill in carrying out the "employer's duty. This has sometimes been expressed by "saying that the duty is personal to the employer; but the "adjective if unexplained is apt to mislead, like the word "'absolute' and the word 'delegate.' The employer can, of "course, and frequently must delegate the performance of any "of his duties to skilled agents."

In *Naismith* v. *London Film Production Ltd.*[72] Lord Maugham's statement was cited and followed, and Goddard L.J. expressed the duty as one "to make the place of employment, "and the plant and material used, as safe as the exercise of "reasonable skill and care would permit." In that case also, however, the court were not concerned with the point which arises in the present case.

The second passage, in particular relied upon, is that of Lord Wright in *Thomson* v. *Cremin*[73]: "The duty of the invitor "towards the invitee is, in my opinion, a duty personal to the "former, in the sense that he does not get rid of the obligation "by entrusting its performance to independent contractors. It is "true that the invitor is not an insurer: he warrants, however, "that due care and skill to make the premises reasonably safe "for the invitee have been exercised, whether by himself, his "servants, or agents, or by independent contractors whom he

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[71] [1938] A.C. 57, 88.

[72] [1939] 1 All E.R. 794, 798.

[73] [1956] 1 W.L.R. 103, 110.

"employs to perform his duty. He does not fulfil the warranty "merely by leaving the work to contractors however reputable or "generally competent. His warranty is broken if they fail to "exercise the proper care and skill." The warranty there referred to, however, does not extend to the care and skill of persons not in any contractual relationship with the defendant but only to the care and skill of those "whom he employs to "perform his duty."

I would also refer to *Biddle* v. *Hart*,[74] a decision of this court. In that case a stevedore's workman was injured as a result of a defect in tackle gratuitously provided by the ship as was customary. The Divisional Court had held, affirming the county court judge, that in such circumstances the master was under no duty in regard to the tackle. The Court of Appeal, however, ordered a new trial, holding that the defendant was under a duty and that it was for the jury to consider whether the duty had been performed. It is true that the claim was made under the Employers' Liability Act, 1880, but under that Act the plaintiff to succeed had to prove negligence, and the court clearly did not consider that the stevedore's duty was such that he was responsible for the defect in the shipowner's tackle. Thus Farwell L.J. said [75]: "The Act of 1880 was a mode of depriving the employer "of particular defences which were open to him at common law, "such as common employment and the like. That is pointed "out by A. L. Smith J. in *Howe* v. *Mark Finch & Co.*[76] The "case must therefore be considered as if this plaintiff were an "ordinary person employed to use the tackle by the defendant "for the purposes and for the profit of the defendant. In such "a case the defendant has to take reasonable care that the "tackle, whether his own, or hired, or lent, is reasonably fit for "the purpose for which he employed the plaintiff to use it." And Sir Gorell Barnes said [77]: "It may be that in a case of this "character, although he had that duty, yet, if he had dealt with "these shipowners before and had never had any cause for "complaint, the jury might think that he had reasonably discharged that duty. On the other hand, when you have "evidence that the plant was old and had been in use for a long "time, the jury might say they were not satisfied that reasonable "care had been taken to see that it was in a proper condition. "Once establish the duty the question is, What would the jury "consider a discharge of that duty?"

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[74] [1907] 1 K.B. 649.

[75] Ibid. 654.

[76] (1886) 17 Q.B.D. 187.

[77] [1907] 1 K.B. 649, 653.

Finally, so far as the English authorities are concerned, reference has been made to the position when premises, upon which the servant is required to work, are not in the occupation or control of the master: cf. *Taylor* v. *Sims & Sims*,[78] *Cilia* v. *H. M. James & Sons*.[79] In both those cases it was held that the master owed no duty to see that the premises were safe, but that if there were any duty it had been performed. These cases were, of course, relied upon by the defendants. Though it is unnecessary for the purposes of the present case to come to a final conclusion, I am inclined to the view that these decisions, in so far as they decided that there was no duty, cannot stand with the decision in *Biddle* v. *Hart*.[80] The duty, as it seems to me, is always there, and it is a question for the jury whether that duty has been performed, bearing in mind that the premises are not in the occupation or under the control of the master. That, as I understand his judgment, was the approach of Hilbery J. in *Hodgson* v. *British Arc Welding Co. Ltd.*[81]

Turning to the Scottish authorities, these were strongly relied upon by the plaintiff. Thus, in *Macdonald* v. *Wyllie*,[82] a workman was injured by the fall of a scaffold due to the negligence of a firm of joiners whom his employers, builders, had employed to erect. At the trial the Lord Justice-Clerk had directed the jury that if they were satisfied that the defenders, not having the knowledge and skill to erect the scaffolding in question, selected a tradesman having skill and experience of such work and contracted with him to provide such a scaffold, they would not be liable.

Upon a bill of exceptions it was held that there must be a new trial. Lord Young said[83]: " The basis of the workman's claim " against his master is that there is a responsibility on the part " of his employer for the scaffolding being in a reasonably safe " condition to enable the workman to perform the work which " he has been engaged to do.

" According to the law of Scotland in the contract of master " and servant, apart from special stipulation to the contrary, it " is implied that the employer is responsible to his workmen for " the condition of the scaffolding which he has provided for them " to work upon, and that without any reference to the mode " employed by him to erect it." Further, Lord Trayner said[84]: " If a master buys a machine, let us say, necessary for the

[78] 58 T.L.R. 339.
[79] [1954] 1 W.L.R. 721.
[80] [1907] 1 K.B. 649.
[81] [1946] K.B. 302.
[82] 1 Fraser 339.
[83] Ibid. 344.
[84] Ibid. 345.

"execution of his work, and gives it to his workman, it is the "master's machine, not the workman's or manufacturer's. If "the machine turns out to be faulty, defective, or otherwise "insufficient, the master must answer for it."

The words used in these passages read apart from their context strongly support the plaintiff's contentions. But in their context I think they do no more than emphasize that the master's duty is personal in the sense referred to in *Wilsons'* case.[85] The basis of the case was that the master had employed the joiners to erect the scaffold. It is also to be observed that Lord Moncrieff and the Lord Justice-Clerk took a different view, and only granted a new trial on the ground that the direction was incomplete in that the question whether the defect could have been discovered by the master had not been left to the jury.

In *Wilson* v. *Merry and Cunningham*,[86] a case where the defence of common employment was raised, Lord President Inglis said this: "I think that wherever the master of a coal-pit or of "any other work, has occasion to purchase and provide a machine "or apparatus to be used by his workpeople, or for the protection "of his workpeople, he is liable for the insufficiency of that "machine or apparatus if it should turn out to be insufficient." These again are wide words, but again the Lord President was not considering a case where the insufficiency arose as a result of the negligence of a person with whom the master was in no contractual relationship. The next case is *M'Killop* v. *North British Railway Co.*,[87] but this is authority for no more than this, that a railway company is not relieved by the appointment of competent engineers and managers from responsibility for injury arising to a servant from a defect in the construction of the works. Nor can I find anything in the Lord Justice-Clerk's judgment in *Bain* v. *Fife Coal Co. Ltd.*[88] which supports the duty contended for by the plaintiff.

The last case is *Donnelly* v. *Glasgow Corporation.*[89] The driver and conductor of a bus were injured as a result of a defect in the chassis of a bus belonging to their employers. The employers averred that the defect was one of design, the fault of the manufacturers from whom they had bought the bus. It was held that the employers could not escape liability for damages arising from the provision of defective plant by blaming the manufacturers, and that the defences, so far as imputing fault

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[85] [1938] A.C. 57.

[86] (1867) 5 Macph. 807, 811.

[87] (1896) 23 Rettie 768.

[88] 1935 S.C. 681.

[89] 1953 S.L.T. 161.

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against the manufacturers, were irrelevant. The Lord Justice-Clerk, with whom Lord Mackay and Lord Patrick concurred, said[90]: "So far as the driver's and conductor's cases are concerned, they both being servants of the corporation, I have no doubt that the defences are irrelevant. It is admitted by the corporation that the omnibus was defective and they aver that their suppliers were responsible for the defective condition. But on this branch of the law a master cannot escape liability to his servant for defective plant by blaming his agents. The personal responsibility which the law lays on the master in respect of plant covers the activities of any person whom the master employs to provide that plant. The supplier and the master are as one. If then the supplier erred, the master is saddled with the results of that error."

While not binding on this court that decision is, of course, most persuasive authority. Once more, however, the decision appears to be based on agency, but in so far as it treats the manufacturer as the employer's agent I crave leave to doubt its correctness. As I understand the facts there was no suggestion that the chassis had been made to the employer's requirements. It was a standard chassis. Moreover, there was no averment that the master could not with reasonable care have discovered the defect. But in any event that decision, as I read it, is no authority for the duty contended for in the present case, since the employers here were in no contractual relationship with the negligent manufacturers.

Having considered the authorities, I have come to the conclusion that a judgment in favour of the plaintiff involves an extension of the duty owed at common law by a master to his servant. Now that the doctrine of common employment is abolished, and now that the workman can recover direct from the negligent manufacturer, I can see no justification for extending the duty to exercise reasonable care as enunciated by Lord Herschell in *Smith* v. *Baker*.[91]

Accordingly, I would allow this appeal.

PEARCE L.J. I, too, feel reluctance and diffidence at taking a different view from that expressed by Jenkins L.J.

We have to decide what is the legal responsibility of an employer in respect of a tool bought by him without negligence from a reputable supplier who, without negligence, had bought it from a reputable manufacturer, who *was* guilty of negligence in its manufacture. It is clear from the judge's findings that no one save the manufacturer has been at fault.

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[90] 1953 S.L.T. 161, 168.

[91] [1891] A.C. 325, 362.

It is important to consider the exact extent of the employer's duty. If the duty is to exercise care in supplying plant, then one would think at first sight that he must be discharged from liability if he or those to whom he has entrusted the duty have with due care bought a standard tool from a reputable middleman who has bought it from a reputable manufacturer. To hold him liable in such circumstances seems to me tantamount to saying that his duty is to make and that the manufacturer must be regarded notionally as having had that task entrusted to him by the employer.

The duty of an employer in respect of the provision of plant has been put in various phases, all based on a duty to take reasonable care—e.g., he has "the duty of taking reasonable care "to provide proper appliances" (*per* Lord Herschell in *Smith* v. *Baker*[91]); "a duty to furnish [workman] with adequate "materials and resources for the work" (*per* Lord Cairns in *Wilson* v. *Merry & Cunningham*[92]); "a duty of providing good "and sufficient apparatus" (*per* Lord Wensleydale in *Weems* v. *Mathieson*[93]); and of "providing proper plant" (*Toronto Power Co. Ltd.* v. *Paskwan*[94]). Nowhere does one find it described as a duty to make.

In the last cited case it was said[95]: "It is true that the master "does not warrant the plant and if there is a latent defect which "could not be detected by reasonable examination or if in the "course of working the plant becomes defective and the defect "is not brought to the master's knowledge and could not by "reasonable diligence have been discovered by him the master "is not liable and further a master is not bound at once to adopt "all the latest improvements and appliances. It is a question "of fact in each case, was it in the circumstances a want of "reasonable care not to have adopted them." Lord Thankerton, in *Wilsons & Clyde Coal Co.* v. *English*,[96] accepted that passage as adequately expressing the law.

In the same case Lord Wright said[97]: "The same principle, "in my opinion, applies to those fundamental obligations of a "contract of employment which lie outside the doctrine of "common employment, and for the performance of which

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[91] [1891] A.C. 325, 362.
[92] (1868) L.R. 1 Sc. & D. 332.
[93] (1861) 4 Macq. 215.
[94] [1915] A.C. 734, 738.
[95] Ibid. 738.
[96] [1938] A.C. 57, 72.
[97] Ibid. 78.

"employers are absolutely responsible. When I use the word "absolutely, I do not mean that employers warrant the adequacy "of the plant, or the competence of fellow-employees, or the "propriety of the system of work. The obligation is fulfilled by "the exercise of due care and skill." And Lord Maugham said[98]: "In such employments it was held that there was a "duty on the employer to take reasonable care and to use "reasonable skill first to provide and maintain proper machinery, "plant, appliances and works." And later[99]: "It has already "been pointed out that the employer's liability is discharged by "the exercise of due care and skill."

It is clear, therefore, that the duty is merely to use reasonable care and skill in providing adequate plant. This duty, as was pointed out in that case, is one of which the employer cannot rid himself. "But in truth the employer's obligation," said Lord Wright,[100] "as it has been defined by this House, is personal to "the employer, and one to be performed by the employer per se "or per alios. If I may take an analogy or instance of a similar "personal obligation, I note that the Carriage of Goods by Sea "Act, 1924, requires a shipowner to exercise due diligence or to "take reasonable care to provide a seaworthy ship. The ship-"owner is almost certainly not an expert naval architect, "engineer, or stevedore. So far as I know it has never been "claimed that this obligation is fulfilled by the shipowner "taking reasonable care to appoint a competent expert; the "shipowner is absolutely held to the fulfilment of the obligation. "It is the obligation which is personal to him, and not the "performance."

Lord Maugham put the proposition in these words[101]: "It "has already been pointed out that the employers' liability is "discharged by the exercise of due care and skill; and I may "be allowed to point out that it is this circumstance which "has led on occasion to a misapprehension of the true position. "An illustration will demonstrate the mistake. Suppose some "new machinery is necessary in a factory, and the employer is "absent or completely unskilled in such things. He necessarily "leaves the matter to a manager, let us suppose a highly "skilled person, who, however, is negligent in this case. An "accident follows, due to a defect in the machine. If the "liability of the employer is stated as being an obligation to "use his best endeavours to supply and instal good machinery,

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[98] [1938] A.C. 57, 86.

[99] Ibid. 87.

[100] Ibid. 80.

[101] Ibid. 87.

"it may well be said on his behalf that he left the matter to "a highly skilled man, and it may be asked with force, what "more could he do? I should reply, nothing; but I should "add that the premise is incorrect. The possessive pronoun "'his' is that which leads to the error. The proposition would "be more correctly stated to be that his duy is to supply and "instal proper machinery so far as care and skill can secure "this result. He can, and often he must, perform this duty "by the employment of an agent who acts on his behalf; but "he then remains liable to the employees unless the agent has "himself used due care and skill in carrying out the employer's "duty."

Four years after *Wilsons & Clyde Coal Co.* v. *English* in *Thomson* v. *Cremin*,[102] Lord Wright again defined the rule which he said the House had in a different context applied in *Wilsons & Clyde Coal Co.* v. *English*. "The duty of the invitor towards "the invitee is, in my opinion, a duty personal to the former, "in the sense that he does not get rid of the obligation by "entrusting its performance to independent contractors. It is "true that the invitor is not an insurer: he warrants, however, "that due care and skill to make the premises reasonably safe "for the invitee have been exercised, whether by himself, his "servants, or agents or by independent contractors whom he "employs to perform his duty. He does not fulfil the warranty "merely by leaving the work to contractors, however reputable "or generally competent. His warranty is broken if they fail "to exercise the proper care and skill."

As long as the employer's liability is based on want of care it is a difficult concept to regard him as vicariously liable for the negligence of a manufacturer whom he did not employ, who never had any business relations with him, and who (if they are both companies) may even have ceased to exist before the employer came into existence. The employer can hardly be said in such a case to have made the tool per se or per alios. Yet, here, it was only in the making that there was negligence. Such a concept would presumably make an employer liable if he bought a factory which through the negligence of the original builder years before had a defect (undiscoverable by reasonable examination when once the building was completed) which subsequently harmed his employee.

To call this a vicarious liability would be to use the words in quite a different sense from any in which, as far as I can see, they have hitherto been used. If the liability were based on a breach of a warranty of the fitness of the plant, the concept would be a neat and easy one. But such a warranty has always been expressly disclaimed by the courts. One is bound, therefore, to inquire closely whether the words in the opinions on which the respondent chiefly relies fairly compel one to the conclusion reached by the judge.

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[102] [1956] 1 W.L.R. 103n., 110.

It strikes me as strange that, if Lord Wright and Lord Maugham were intending their words to cover such a case as this, they made no mention of it. Defects in machinery or tools that have been bought from suppliers or manufacturers must have been a possibility present to their minds. Indeed, Lord Maugham gives a specific illustration dealing with a defect in new machinery in the passage I have read. In speaking of "a defect in the machine" he is referring, as I understand it, to a defect which would have been discovered by a careful manager, and he bases the liability of the employer on the manager's negligence. If the respondent's argument is correct, the employer would have been liable in any event (since ex hypothesi the defect was discoverable) and the manager's negligence would have been irrelevant.

Again, it is noticeable that Lord Wright in the passage which I have read refers to the naval architect, the engineer, the stevedores, as people for whose neglect the shipowner will find himself vicariously liable. He does not refer to the shipbuilder. It seems to me unlikely that he was intending to express a principle by which every subsequent purchaser of the ship will be liable to his employee for some undiscoverable defect due to the original negligence of the shipbuilder. By undiscoverable defect I mean a defect that though patent to the shipbuilder during the construction was not discoverable by subsequent purchasers using reasonable care.

It seems to me that the opinions read fairly in their contexts are dealing only with the negligence of persons to whom the employer has "entrusted" the provision of plant and are concerned to make the point that although they be independent contractors, yet anything that they do is the act of the employer acting per alios. If those opinions were intending to define a rule of such far reaching consequence that it would make the employer responsible for defects due to the negligence of the manufacturer and undiscoverable by a purchaser even in respect of small standard articles that he buys, I would think it probable that they would have said so in express terms.

When Lord Maugham in the passage which I have read expressly eliminates the word "his," and says that "the proposition would be more correctly stated to be that his duty "is to supply and instal proper machinery so far as care and "skill can secure this result," he follows it with the sentence, "He can, and often he must, perform this duty by the employment of an agent who acts on his behalf; but he then remains "liable to the employees unless the agent has himself used due "care and skill in carrying out the employers' duty." I think that, in the context, he is removing the limitation of the pronoun "his" in order to widen the principle only to the extent of substituting (by implication) the words "the care "and skill of any persons whether agents or independent contractors who have been entrusted by the employer with the "fulfilment of his duty."

I would therefore regard the respondent's contention in this case as extending the words of Lord Wright and Lord Maugham beyond their true intention. To regard the tool in question on the facts of this case as having been manufactured by the employer per alios seems to me unreal and artificial and I venture to think it cannot be right in principle.

I see the force of the argument that the view of the matter which I have expressed may seem to draw a capricious line between the employer who buys a standard article of plant from a middleman and the employer who makes it himself or the employer who has the article specially made for him by a manufacturer to his special requirements (as in *Paine* v. *Colne Valley Electricity Supply Co. Ltd.*[103]). But every line is liable to have anomalies along its borders and I do not think that is a sound argument for not drawing a line at all if principle seems to demand that it should be drawn.

I agree with Parker L.J. in his observations on the Scottish cases and I have nothing to add to them.

For the reasons I have given and those more clearly and cogently set out by Parker L.J. I would allow the appeal.

Appeal allowed.
Leave to appeal.

Solicitors: *E. P. Rugg & Co.; W. H. Thompson; Doyle, Devonshire & Co. for Kershaw, Tudor & Co., Sheffield.*

F. R. D.

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[103] 55 T.L.R. 181.

1957
Nov. 25;
Dec. 3.

Lord Goddard C.J., Devlin and Pearson JJ.

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Criminal Law—Practice—Venue—Removal of trial on ground of prejudice—Retrial ordered at assizes for other place—Committal to next assizes but one for other place—Power to change venue to foreign court limited to next assizes or sessions—Criminal Justice Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 86), *s.* 14 (2)*—Administration of Justice* (*Miscellaneous Provisions*) *Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 63), *s.* 11 (3).

The power given by section 14 (2) of the Criminal Justice Act, 1925,[1] to a court of assize or quarter sessions to direct that the trial of a person committed to that court for an indictable offence should take place before a court of assize or quarter sessions for some other place is limited to committal to the next assizes or quarter sessions for that other place; there is no jurisdiction to direct the trial to take place at the next assizes but one.

Prejudice is not a ground for the undue postponement of a trial and where removal is sought on that ground and there is any doubt as to a suitable court to which to send it, a convenient course is for the court to discharge the jury and order a retrial at the next assizes for the county or city where the indictment has been preferred, leaving it either to the prosecution or the defence to apply to the Queen's Bench Divisional Court for an order under section 11 (3) of the Administration of Justice (Miscellaneous Provisions) Act, 1938,[2] when it has been ascertained at what court the case can conveniently and expeditiously be disposed of.

MOTION.

In November, 1957, on the second day of the trial before Salmon J. at Exeter Assizes of the defendant, John Henry Walter Oliver, on a charge of murder, there appeared in three national newspapers circulating in Exeter reports of the previous day's proceedings which, in their account of the opening speech of counsel for the Crown, contained prejudicial matters which had been given in evidence and reported in the local press during the proceedings before the justices, but which counsel had deliberately refrained from opening.

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[1] Criminal Justice Act, 1925, s. 14 (2): "Where for any reason whatsoever the trial of a person who has been committed to be tried for an indictable offence before a court of assize or quarter sessions for any place is either not proceeded with or not brought to a final conclusion before that court, it shall be lawful for that court, if in its discretion it thinks it convenient so to do with a view either to expediting the trial or re-trial or the saving of expense or otherwise and is satisfied that the accused will not thereby suffer hardship, to direct that the trial or re-trial of the accused shall take place before a court of assize, or . . . before a court of quarter sessions, for some other place."

[2] Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 11 (3): "If it appears to the High Court to be expedient in the interests of justice, the court may direct that an indictment . . . shall, instead of being tried at the court of assize . . . at which it would but for the direction be tried, be proceeded with and tried at such other court of assize . . . as may be specified in the direction."

The reports were brought to the attention of the trial judge who discharged the jury, and, after a discussion with counsel for the defence, and acting under section 14 (2) of the Criminal Justice Act, 1925,[1] directed that the retrial should take place at Winchester Assizes, not at the forthcoming Autumn Assizes but at the Winter Assizes due to take place in March, 1958.

The Attorney-General applied to the court for an order under section 11 (3) of the Administration of Justice (Miscellaneous Provisions) Act, 1938,[2] directing that the retrial should take place at the next session of the Central Criminal Court. The defendant opposed the application and he also sought an order that no account of the proceedings before the court should be published in the press until completion of the trial.

Sir Reginald Manningham-Buller Q.C., A.-G., E. S. Fay Q.C., Rodger Winn and *Michael Hoare* in support of the motion. The trial judge had no power to order that the trial should take place at the Winchester Winter Assizes. Section 14 (2) of the Criminal Justice Act, 1925, gives power to direct that a trial shall take place before a court of assize or quarter sessions for some other place, but at the next assizes or sessions, not at the next but one, for that other place. Subsections (1) and (5) of section 14 of the Act of 1925 were repealed by the Magistrates' Courts Act, 1952, s. 132 and Sch. VI, and replaced by section 10 (1) and (2) of the latter Act, but a consideration of their provisions throws light on the scope of subsection (2). Subsection (1) of section 14 of the Act of 1925 deals with committal by justices to assizes and quarter sessions, and if subsection (2) contains a power to commit beyond the next assizes, subsection (1) should have an equally wide meaning. But if the language of subsection (1) were to be so construed, there would have been no need for the express power to commit beyond the next quarter sessions contained in subsection (5). Section 6 of the Habeas Corpus Act, 1679, indicates the absence of a power to postpone trial beyond the next assizes, and but for the provisions of section 14 of the Criminal Justice Act, 1925, there would have been no power to order a trial to take place at some other place: see also section 27 of the Criminal Procedure Act, 1851, where there is a power only to adjourn to the "next subsequent session."

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[1] See footnote 1, p. 250.

[2] See footnote 2, p. 250.

It would be undesirable if the trial were to be postponed until next March. The matter complained of was published in August on the defendant's committal; it was not thought likely to prejudice his trial two-and-a-half months later, and there is no ground for supposing that the republication on November 5 was so prejudicial and likely to endure that the trial must be postponed for four months. Such a delay may well affect the recollection of witnesses.

If the order made by the judge was valid, the court has power under section 11 (3) of the Administration of Justice (Miscellaneous Provisions) Act, 1938, to substitute another order for it, and in the circumstances the court is asked to order that the trial should be transferred to the Central Criminal Court or such other assizes as the court should think proper.

Norman Skelhorn Q.C. and *H. E. Park* for the defendant. The order made by the trial judge was valid. Subsection (2) of section 14 of the Criminal Justice Act, 1925, should not be construed by reference to subsection (1), for the matters to be considered before an order may be made under subsection (1) and the purpose of that subsection are different. Subsection (1) is concerned with committal for trial by justices. Its purpose is the expedition of the trial; the powers given to the justices are related to that purpose only and an order may be made "having "regard to the time when and place where" the assizes or quarter sessions for some other place are to be held, and there is a proviso to the subsection. Neither such words nor proviso occur in subsection (2), which is concerned with a case where, in the widest possible terms, "for any reason whatsoever" the trial is not proceeded with, then the judge is given a complete and unfettered discretion to send the case to some other place for trial. There is nothing in section 6 of the Habeas Corpus Act, 1679, which is contrary to that construction.

[DEVLIN J. Section 6 of the Habeas Corpus Act, 1679, gives statutory effect to the principle that a defendant is entitled to a speedy trial, and that a judge may not postpone the trial beyond a certain limit. Must not section 14 (2) of the Criminal Justice Act, 1925, be construed in the light of that principle?]

It would be a curious result if, in order to give effect to the right of a defendant to a speedy trial, there was no power to postpone the trial on the application of the defendant. Section

14 (2) of the Act of 1925 gives the judge a discretion so that he may do justice.

Section 27 of the Criminal Procedure Act, 1851, was expressly passed to prevent the old practice whereby an accused person was entitled in cases of misdemeanor to imparle, so that a trial could be put off indefinitely; it is significant that the words "next subsequent session" in section 27 do not appear in section 14 (2) of the Criminal Justice Act, 1925. Such words should not be read into that subsection unless it is necessary to give effect to the section.

The order for which the prosecution now ask would, or at least might, and that is sufficient, result in the defendant not getting an unprejudiced trial. This is an exceptional case; the matter published was highly prejudicial and once the trial was stopped, and the jury discharged, it received further publicity. It was therefore thought advisable that the trial should not take place at Exeter and that there should be time for the publicity to die down. It is conceded that, if the order made by the judge was valid, this court has power under section 11 (3) of the Administration of Justice (Miscellaneous Provisions) Act, 1938, to vary it, but it is submitted that in the circumstances the judge exercised his discretion correctly. It would be an unusual and undesirable course for this court to interfere with such an exercise of discretion. Should the court think it right to alter the order, then it is asked that the trial should take place at the forthcoming Winchester Assizes.

If publication of the present application is permitted, it is inevitable that there will be further prejudice, and the court is asked to order that no report of this application be published until the completion of the trial. The court has power to make such an order in respect of and in the course of pending proceedings: *Rex* v. *Clement*,[3] considered in *Scott* v. *Scott*.[4] There is a possible distinction between this case and *Rex* v. *Clement*[5] in that these proceedings are in form a motion to change the venue and as such are complete in themselves, but it is submitted that for this purpose they must be regarded as interlocutory and as an application forming part of pending proceedings. If there is no power to make such an order, then the submission that the order made by the judge should stand is reinforced because of the increased prejudice which would result from publicity given to these proceedings.

[3] (1821) 4 B. & Ald. 218.

[4] [1913] A.C. 417; 29 T.L.R. 520.

[5] 4 B. & Ald. 218.

Sir Reginald Manningham-Buller Q.C., A.-G. in reply. There is no substance in the contention that publication of reports of this application might prove prejudicial to the trial of the defendant; if the court has power to make an order prohibiting publication, it is submitted that it should not be exercised in this case.

The conditions which require to be satisfied before an order may be made under section 14 (1) of the Criminal Justice Act, 1925, may differ from those set out in subsection (2) of that section, but both subsections use the expression court of assize or court of quarter sessions "for some other place," and should be construed in the same manner. Reliance is also placed on the duty of clearing the gaols imposed on judges. Had Parliament desired to confer on judges power to fix trials, perhaps for a long time ahead, express words would have been required, but there is nothing in subsection (2) of section 14 from which such a power can even be implied. The term "court of assize . . . for some "other place" clearly means the next assizes for that other place.

Lord Goddard C.J. The court will order that the case be tried at the next session of the Central Criminal Court. We regard the case as one of considerable importance and will put our judgment into writing. We do not see fit to make any order as regards publication of the proceedings.

Dec. 3. Lord Goddard C.J. The judgment I am about to read is the judgment of the court.

On November 4, 1957, the trial of John Henry Walter Oliver for murder began at the Exeter City Assize before Salmon J. The next morning counsel for the Crown called the attention of the judge to reports of the previous day's hearing which had appeared that morning in three national newspapers which circulated in Exeter. In the report of counsel's opening speech matters were included which in fact counsel had deliberately refrained from opening though they had been given in evidence and published in the local press during the magisterial proceedings. These matters had formed part of the statement which it was alleged the defendant had made to the police, but in his discretion counsel had decided not to refer to them in opening, and whether they would or would not have come out in the course of the trial is immaterial. When this was brought to his notice the judge decided to discharge the jury in case any of them had seen these inaccurate reports which, in his opinion and in that of counsel for the Crown and defence, were highly prejudicial. The judge also directed that in these circumstances the trial should take place away from the city of Exeter, and after discussion with counsel for the defence he directed that the trial should take place at the assizes for the county of Southampton, not at the forthcoming Autumn Assize, but at the Winter Assize which will not be held till March, 1958. While no doubt counsel for the prosecution agreed that it was desirable that the case should be tried elsewhere than in Exeter, he took no part in the discussion as to where or when it should be tried, but offered no opposition to the order which was made.

The Attorney-General now moves this court under section 11 (3) of the Administration of Justice (Miscellaneous Provisions) Act, 1938, for an order directing the trial to take place at the next session of the Central Criminal Court. That subsection is in these terms: "If it appears to the High Court to be expedient "in the interests of justice, the court may direct that an indict-"ment or inquisition shall, instead of being tried at the court of "assize or quarter sessions at which it would but for the direction "be tried, be proceeded with and tried at such other court of "assize, or, if the offence is within the jurisdiction of quarter "sessions, at such other court of quarter sessions, as may be "specified in the direction."

In making the order he did the judge was relying on section 14 (2) of the Criminal Justice Act, 1925, which reads as follows: "Where for any reason whatsoever the trial of a person "who has been committed to be tried for an indictable offence "before a court of assize or quarter sessions for any place is "either not proceeded with or not brought to a final conclusion "before that court, it shall be lawful for that court, if in its "discretion it thinks it convenient so to do with a view either to "expediting the trial or re-trial or the saving of expense or "otherwise and is satisfied that the accused will not thereby "suffer hardship, to direct that the trial or re-trial of the accused "shall take place before a court of assize, or (if the offence is "within the jurisdiction of a court of quarter sessions) before a "court of quarter sessions, for some other place."

It is only right to say that it was at the suggestion of counsel for the defence that the judge ordered the case to go to the Winter Assize. From the shorthand note it appears that counsel expressed doubt whether it would be possible for the case to be tried at the forthcoming Autumn Assize where there is already a heavy calendar, and before this court he contended that by next assize there would not be enough time for any prejudice to die down. This is not a ground which appeals to this court. We think that it is almost fanciful to say that jurors in Hampshire would have been so interested in a trial for murder at Exeter that if they had read the reports in any of these papers they would remember the details so that they could not be trusted to try the case impartially. It is perhaps worth remembering what Lord Denman C.J. said as long ago as 1833 in *Rex* v. *Holden*[1]: "When men are summoned into a jury-box to decide upon a case "of felony, such prejudice is very apt to die away: It is a kind "of feeling which juries are learning more and more to lay aside; "and we should rather relax that disposition by being too ready "to suppose that they would be influenced by unjust impres-"sions." Moreover, according to the shorthand note the ground on which the judge was asked to send the case to the Winter Assize was the possible difficulty of getting it tried at the Autumn Assize owing to the pressure of business, but it is right that I should say that he did have in mind the possibility of prejudice still existing, and he has also told us that he did not send the case to the Central Criminal Court partly because he thought that this was not looked upon with favour and partly because he was not asked to do so.

This court is of opinion that it has power to entertain the application of the Attorney-General even if it was a matter within the judge's discretion, but if he had jurisdiction to make it we should naturally be reluctant to interfere, especially as it was supported by the defence and no objection was taken by the prosecution when it was made. As we have said, the judge relied on section 14 (2) of the Criminal Justice Act, 1925, but the Attorney-General contends that that section must be read as giving power to the court to direct trial at some other place than that to which the accused was committed, but only to the next assize for that place.

It must be remembered that this section made a considerable change in the law of venue and for the first time enabled a court of assize or quarter sessions to direct an indictment to be tried at a foreign court. For very many years statutory provision has been made for ensuring the prompt trials of persons charged with either felony or misdemeanor. Section 6 of the Habeas Corpus Act, 1679, contains stringent provisions to this end so that a prisoner not tried at the next sessions or gaol delivery may claim to be released on bail and, if not tried at the following sessions, may be discharged. Section 27 of the Criminal Procedure Act, 1851, provides that the court may, on the application of a person indicted or otherwise, postpone the trial to the next subsequent session to give him time for the preparation of his defence or otherwise. The Assizes Relief Act, 1889, s. 3, provides for the discharge of a prisoner where he is not tried at the next quarter sessions, and section 14 (5) of the Act of 1925 contained an express provision enabling the committal to be to the next quarter sessions but one, and then only if the next sessions are to be held within five days of the date of committal and only if the accused is bailed. All these statutory provisions are no doubt for the protection of the accused and it may be contended that there is no reason why the direction should not be for trial to an assize subsequent to the next one if the accused consents. But the section gives a new power to the court, and in our opinion that power is to commit to some other place and must be limited to the next assizes or sessions for that other place. We cannot think that Parliament intended to give so wide a power as is contended for in this case, especially in view of the provisions for ensuring trials at the next assizes or sessions to which we have referred. As the matter is one of jurisdiction, consent cannot enlarge the power. Moreover, if the argument to the contrary which was addressed to us were to prevail, it would follow that it would be left to the discretion of the court either at the instance of the prosecutor or the defence to direct the trial to take place at any subsequent assize to be held for the county to which the indictment is sent provided it was satisfied that the accused would not suffer hardship, which might in most cases at least be avoided by granting bail, though the prosecution might be seriously hampered by the death or absence of witnesses.

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[1] (1833) 5 B. & Ad. 347, 355.

In our opinion, if this power of changing venue to a foreign court is exercised the case must be committed to the next assizes or sessions, subject in the case of the latter to the provisions of section 14 (5) of the Act of 1925,[2] which would be an unnecessary subsection if the court always had that power under subsection (2).

We accordingly thought we ought to exercise our powers under section 11 (3) of the Act of 1938, and have already directed the trial to take place at the next session of the Central Criminal Court, that is to say, the present session, which began yesterday. While we do not encourage frequent recourse to that court as a place of trial, as it is usually more than fully occupied with its own cases, charges of murder are generally regarded as an exception and ought to be tried as quickly as possible, and, indeed, before the Act of 1938, if a case had to be removed for trial on the ground of local prejudice it was to the Central Criminal Court that it had to go: see 19 & 20 Vict. c. 16, commonly called "Palmer's Act," and repealed by the Act of 1938. We may say for future guidance that where removal of a case is sought on the ground of prejudice and there is any doubt as to a suitable court to which to send it, it would be a convenient course for the court to discharge the jury and order a re-trial at the next assizes for the county or city where the indictment has been preferred, leaving it either to the prosecution or the defence to apply to this court for an order under section 11 (3) of the Act of 1938 when it has been ascertained at what court the case can conveniently and expeditiously be disposed of.

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[2] See now s. 10 (2) of the Magistrates' Courts Act, 1952.

At the end of the hearing, and after we had announced our decision, we were asked to direct that no report of these proceedings should appear in the press, and we were referred to *Rex* v. *Clement*[3] as an authority enabling the court to give such a direction. That was a case in which several persons were to be tried separately in respect of the same offence, and the court did direct that no report of any one case should appear until all were tried. We do not think it necessary to decide whether that case would enable us to forbid the publication of such proceedings as these because we are satisfied that no possible prejudice can be caused to the accused man as no reference was made during the hearing to the articles to which exception was taken.

Order accordingly.

Solicitors: *Director of Public Prosecutions; Theodore Goddard & Co. for Crosse & Crosse, Exeter.*

J. F. L.

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[3] (1821) 4 B. & Ald. 218.

WINCHESTER *v.* FLEMING.

[1956 W. No. 1984.]

1957
Oct. 30, 31;
Nov. 1, 4, 5,
6, 7, 8, 11,
12, 26.

Devlin J.

Enticement—Harbouring—Harbouring of husband—Allegation by wife that husband harboured against her will—No allegation of enticement—Whether action for harbouring simpliciter will lie at suit of a wife.

Judicial Precedent—Obsolete actions—Action out of harmony with modern ideas—Refusal by court to modernize—Action kept strictly within limits established by authority.

An action for harbouring, in the absence of enticement, will not lie at the suit of a wife.

An action for harbouring simpliciter at the suit of a husband was known to the common law, but such an action, based on an interference with the economic process by which a wife, refused food and shelter elsewhere than in the matrimonial home, would eventually be forced to return to it, cannot be brought into harmony with modern ideas and should therefore be kept strictly within the limits established by authority.

Best v. *Samuel Fox & Co. Ltd.* [1952] A.C. 716; [1952] 2 T.L.R. 246; [1952] 2 All E.R. 394 applied.

Philp v. *Squire* (1791) Peake 114 and *Gottlieb* v. *Gleiser*, Note, post, p. 267, considered.

ACTION.

On July 2, 1952, the plaintiff, the Marchioness of Winchester, and Lord Winchester were married. Before the marriage Lord Winchester had spent some nine months as the guest of the defendant, Evelyn Beatrice Sainte Croix Fleming, a widow of considerable means, living in a cottage on her estate, Emerald Wave, near Nassau; the cottage was a few minutes' walk from the defendant's house, where he had his meals, and during this time they had become close friends. After their marriage the plaintiff and Lord Winchester spent about five months together, but in January, 1953, he left to stay with friends and she went on a visit to India; a quarrel developed in correspondence between them and in August he wrote to her that he was determined never to live with her again. Meanwhile the affectionate association between the defendant and Lord Winchester continued, consisting for the most part of correspondence, and in October, 1953, they met and went back together to Nassau where they resumed life as it was before the marriage, and Lord Winchester occupied the cottage on the same terms as before. On May 24, 1954, the plaintiff issued a writ [1] claiming damages for libel and enticement against the defendant; the defendant counterclaimed for damages for libel, and on July 19, 1956, that action was compromised on terms set out in a memorandum of terms of settlement. By the terms of settlement the parties mutually withdrew all charges, imputations and allegations made by the one against the other in the action, and by clause 3: "The parties mutually agree with "and undertake to each other that neither of them shall at any "time hereafter or in any manner directly or indirectly disturb "or interfere with the other of them."

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[1] 1954 W. No. 1818.

On July 26, 1956, Lord Winchester filed a petition in the Supreme Court of the Bahama Islands for a decree of nullity of his marriage to the plaintiff, which suit was subsequently heard and dismissed on the ground that he was not domiciled in the Bahamas.

On August 8, 1956, the plaintiff issued the writ in the present action claiming damages for breach of the contract contained in the terms of settlement of July 19, 1956. She alleged that the defendant was in breach of that agreement and undertaking in that she had persuaded and induced Lord Winchester to file the petition for nullity in the Bahamas (and, by amendment to her statement of claim), had financed Lord Winchester in the prosecution of the petition, and had harboured him against the will of the plaintiff. By her defence the defendant, inter alia, denied the allegations.

This report is confined to the question of law arising out of the plaintiff's allegation that the defendant was in breach of the contract by harbouring her husband.

Neville Faulks and *Brian Neill* for the plaintiff.

Gilbert Beyfus Q.C. and *Helenus Milmo* for the defendant. The alleged harbouring was no more than a continuance of the position at the time of the signing of the contract. That could not in itself be an interference within the meaning of the contract, nor was it wrongful apart from the contract. Harbouring by itself is not a tort giving rise to a cause of action, but has always been combined with an action for enticement. "Harbouring" is only used to denote the continuation of the original enticement from which it flows, and there must have been something active in the nature of persuasion: see *Place* v. *Searle* [2] and *Winsmore* v. *Greenbank*.[3]

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[2] [1932] 2 K.B. 497; 48 T.L.R. 428.

[3] (1745) Willes 577.

If harbouring simpliciter is a tort known to the law, then it is submitted that, unless there is some element of enticement, it is not actionable at the suit of a wife who alleges that her husband has been harboured by the defendant; there is no case in which such an action has been held to lie. If it were held to exist today, the social results might be disastrous. Nor can there be any harbouring when it is shown that the harboured person would not, apart from the harbouring, have gone back: see *Jones Brothers (Hunstanton) Ltd.* v. *Stevens*,[4] where it was established that a servant whom the defendant was accused of harbouring was resolutely determined not to return to the plaintiff's employment. Further, there can be no harbouring in this case, for the plaintiff's husband was entitled not to return to a wife who was casting upon him insults and accusations: *Russell* v. *Russell*.[5]

Neville Faulks in reply. Harbouring exists as a tort and it is separate and distinct from enticement. In both *Philp* v. *Squire* [6] and *Berthon* v. *Cartwright* [7] the suit was for harbouring, and although judgment was given for the defendant in each case it was not said that the action would not lie. In *Butterworth* v. *Butterworth* [8] McCardie J. distinguished [9] "the common law "action which lay either for knowingly seducing away a wife "from cohabitation with the husband, or for harbouring a wife "after notice that she had left her husband without his consent," and see Bullen and Leake's Precedents of Pleadings, 3rd ed. (1868), p. 340, referred to by McCardie J.[9] That harbouring exists as a separate tort is the inference from *Winsmore* v. *Greenbank* [10]: see the observation of Lord Willes C.J.[11]: "every "moment that a wife continues absent from her husband without "his consent, it is a new tort"; and see also Winfield on Tort, 6th ed. (1954), p. 272. In *Place* v. *Searle* [12] Scrutton L.J., approving *Winsmore* v. *Greenbank*,[13] said [14]: "That case is not "old law, although it was decided a long time ago"; and see also *Best* v. *Samuel Fox & Co. Ltd.*[15]

Today the position in law of a wife is the same as that of a husband. She has the same rights and it is submitted that an action for harbouring will lie at the suit of a wife. Harbouring is analogous to enticement and a wife may bring an action for enticement: *Gray* v. *Gee*,[16] *Newton* v. *Hardy*[17] and *Elliott* v. *Albert*.[18] In *Wright* v. *Cedzich*[19] the High Court of Australia, holding that the wife had no right of consortium on which she could sue, refused to follow *Gray* v. *Gee*,[20] but the attention of the court is directed to the dissenting judgment of Isaacs J.,[21] and also to the observations on the opinion expressed by Rich J.[22] in the speech of Lord Goddard in *Best* v. *Samuel Fox & Co. Ltd.*[23] See also Winfield on Tort, 6th ed. (1954), pp. 271–274, where, in particular, reliance is placed on the passage (at p. 274): "It is submitted, although there is no decision to that effect, that "mere harbouring of a husband is just as tortious as harbouring "of a wife."

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[4] [1955] 1 Q.B. 275; [1954] 3 All E.R. 677.
[5] [1895] P. 318; 11 T.L.R. 529.
[6] (1791) Peake 114.
[7] (1796) 2 Esp. 480.
[8] [1920] P. 126; 36 T.L.R. 265.
[9] [1920] P. 126, 129.
[10] Willes 577.
[11] Ibid. 583, 584.
[12] [1932] 2 K.B. 497.
[13] Willes 577.
[14] [1932] 2 K.B. 497, 514.
[15] [1952] A.C. 716; [1952] 2 T.L.R. 246; [1952] 2 All E.R. 394.

Jones Brothers (Hunstanton) Ltd. v. *Stevens*[24] does not assist the defendant. The action per quod servitium amisit is on a different basis from the action per quod consortium amisit, and it is not a defence to show that the husband would not have returned to the wife. The wife's right to consortium continues to exist unless she has committed a matrimonial offence, or the husband has good cause, as in *Russell* v. *Russell*[25]; but *Russell* v. *Russell*[25] is distinguishable from this case on the facts. [Reference was also made to *Lynch* v. *Knight*.[26]]

DEVLIN J. On this point I hold that there was no breach of contract by harbouring. I will reserve my judgment and put it into writing.

Cur. adv. vult.

November 26. DEVLIN J. stated the facts set out above and continued: The breaches of contract alleged consist of various acts that are said to amount to interference within the meaning of clause 3 of the terms of settlement and which can be conveniently grouped under three heads as follows: (1) an allegation that the defendant persuaded and induced Lord Winchester to file the petition of nullity, and also to remain separate and apart from his wife; (2) an allegation that the defendant financed Lord Winchester in the prosecution of the petition; and (3) an allegation that she harboured him against the will of the plaintiff.

[16] (1923) 39 T.L.R. 429.

[17] (1933) 149 L.T. 165; 49 T.L.R. 522.

[18] [1934] 1 K.B. 650.

[19] (1930) 43 C.L.R. 493.

[20] 39 T.L.R. 429.

[21] 43 C.L.R. 493, 500.

[22] Ibid. 518.

[23] [1952] A.C. 716, 732.

[24] [1955] 1 Q.B. 275; [1954] 3 All E.R. 677.

[25] [1895] P. 318.

[26] (1861) 9 H.L.C. 577.

The first of these heads was all that was originally pleaded. The third was added by amendment applied for at the beginning of the trial and which, after argument, was allowed without objection on the terms that the plaintiff abandoned an action containing similar but wider allegations which she had begun in the Supreme Court of the Bahamas. The second head was added by an amendment that was applied for after the close of the plaintiff's case; and as this amendment was opposed I must set out shortly the circumstances. [His Lordship set out the circumstances and his reasons for allowing the amendment and continued:] I shall consider first the third head of breach because the relevant facts are admitted and only the law is in dispute. While Lord Winchester lived at the cottage he had all his meals at the house and so the defendant in effect provided him with board and lodging in her home although she knew that the plaintiff wanted him to return and live with her. Mr. Faulks submits that this is "harbouring"; and that whether or not the defendant's conduct was actionable under the ordinary law, under the contract it was an interference. If one is going to leave out of account the ordinary law, I think that one should leave out of account also the expression "harbouring," for it is one which is derived from the law of tort. Therefore I ask myself simply whether the defendant was interfering with the plaintiff within the meaning of the contract by failing to turn her husband out of doors on July 19. The contract must be construed in the light of the surrounding circumstances, and these include the fact that for nearly three years before its execution Lord Winchester had been living in Emerald Wave under an arrangement which had all the appearances of being permanent. If the plaintiff wanted it to be a term of the settlement that that arrangement should end, I think that much more precise words were required, and I do not think that the object was achieved by the general provision that the parties should refrain from interfering with each other.

But I cannot, as Mr. Beyfus would have me do, take precisely the same view of the defendant's conduct if apart from the contract it was wrongful. If the harbouring was a wrongful invasion of the plaintiff's legal rights, I should find it difficult to hold that it was not also an interference under the contract; and on this reading I can find nothing in the contract which would be held to condone it. I therefore find it relevant to inquire whether the defendant's conduct was wrongful under the law of tort.

There is no doubt that enticement and harbouring in combination constitute a tort. But the form of the action which I am trying requires this combination to be split up, for I have not to concern myself with anything that happened before the date of the contract, and it is not suggested that after that the enticement was still operating. Mr. Beyfus submits that there is no tort of harbouring simpliciter. In support of his contention that there is, Mr. Faulks has been able to produce only one case, a decision by Lord Kenyon C.J. In *Philp* v. *Squire* [1] the claim failed but the cause of action was clearly recognized. The plaintiff's wife came to the house of the defendant to whom she was related by marriage and represented herself to have been very ill-used. The defendant received her and allowed her to live there after he had received notice from the husband not to harbour her. Lord Kenyon C.J. said [2]: "The ground of this action is that the "defendant retains the plaintiff's wife against the inclination of "her husband, whose behaviour he knows to be proper; or from "selfish and criminal motives. But where she is received from "principles of humanity the action cannot be supported." The industry of counsel has not been able to discover any later case in which harbouring has been recognized as a separate tort. In *Gottlieb* v. *Gleiser* [3] the plaintiff sued his mother-in-law alleging that she wrongfully enticed his wife to withdraw herself from her married life and received her and harboured her against the will of the plaintiff. The action was tried by Denning L.J., sitting as a judge of first instance, and he decided that there was no cause of action. He held that the rule had never been extended so as to enable a husband to sue his mother-in-law for enticement and that such actions should not be started now. It is unfortunate that this important decision is nowhere fully reported. If the action for enticement and harbouring can be brought only against persons in the position of a lover or a mistress, it seems to me that the action for harbouring simpliciter, which involves no element of seduction anyway, cannot exist at all; and for the purposes of this case I have to ignore any element of seduction or enticement that was alleged against the defendant in the previous action. But if this is the right view of *Gottlieb* v. *Gleiser*,[4] then it seems to me that it must also follow that it is in conflict with *Philp* v. *Squire*.[5] This decision does not appear to have been cited to Denning L.J. and I cannot treat it as disapproved.

I think that the tort of harbouring as a separate offence and without enticement is one that was known to the common law.

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[1] (1791) Peake 114.

[2] Ibid. 115.

[3] Note, post, p. 267.

[4] Ibid.

[5] Peake 114.

Lord Kenyon C.J. is clear upon the point and there is other authority cited in Winfield on Tort, 6th ed. (1954), p. 272. But it may be that the time has come to treat it in the way Lord Shaw of Dunfermline was prepared to treat parts of the law of maintenance, when he said in *Nevill* v. *London Express Newspaper Ltd.*[6]: "Needless to say, these things, once claimed as "being part of the common law of England, have long since disappeared. They are repugnant to sensible and modern ideas." No doubt such disappearances are more fittingly announced in appellate courts than by judges of first instance. But if a refusal to recognize obsolescence leads to complete absurdity, a judge in any court would have to notice it. The reason why harbouring was considered objectionable was because it interfered with the economic process by which a wife, refused food and shelter elsewhere than in the matrimonial home, would eventually be forced to return to it. This is no longer an accepted method of effecting a matrimonial reconciliation. Parliament recognized that such methods were obsolete when by the Matrimonial Causes Act, 1884, s. 2, it abolished the process by which spouses who refused to obey a decree for restitution of conjugal rights were imprisoned until they did. Society would not today tolerate a vindictive husband who hounded his wife, however grievously she might have erred, from house to house through the ranks of her friends and relations in order to recapture her, as one might a fugitive slave. What if she was driven to seek public assistance? Would the Crown or some local authority then be liable for harbouring? In a society that is organized on the basis that everyone is in the last resort to be housed and fed by the State, the bottom has dropped out of the action for harbouring.

It would not, however, be proper for me to lay down new law and reject the old unless the facts of this case ineluctably required me to do so. In my judgment they do not. This is a case where the wife and not the husband is suing, and there is no authority at all for the proposition that the action, in the absence of enticement, lies at the suit of the wife. If the tort of harbouring is too firmly established in the law to be removed by judicial action, then I think that until the time comes when it is abolished, or at least regulated, by statute, it should be kept strictly within the limits at present established by authority. No doubt according to modern ideas wives should have the same marital rights as husbands. But where the choice lies between leaving a decaying form of action in the shape in which it was originally constructed and adding on up-to-date extensions, the court may refuse to embark on the task of modernization. That was the view taken by the House of Lords of a wife's claim for loss of consortium in *Best* v. *Samuel Fox & Co. Ltd.*[7] It is true that there is authority for the view that in enticement cases the wife's position is the same as that of the husband. But that consideration did not sway the House of Lords and in my judgment it is not one that is appropriate here. While there is no way by which one can bring the notion of submission by starvation into harmony with modern ideas, the task of modernizing the action for enticement need not be quite so unrewarding; enticement involves the deliberate break-up of marriage and that is still regarded as reprehensible, whether it be done by a man or a woman.

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[6] [1919] A.C. 368, 414; 35 T.L.R. 167.

Moreover, if the action for harbouring simpliciter was extended to include a complaint by a wife, it would become a mongrel product to be regarded as unnatural by whatever age produced it. The idea that it is wrong to harbour a husband would have found no greater favour in the eighteenth century than it does in the twentieth. In the eighteenth century there would have been no sympathy with the idea that a wife should have the same quasi-proprietary rights over a husband as he had over her, and also impossible to imagine that a husband could be forced by necessity to return to the bounty of his wife. In the twentieth century there can be no sympathy with the idea at all, whether the initiator is the husband or the wife. There is no sense in seeking to unite the ideas of two different centuries if the offspring of the union is going to be one which would be repudiated by both its parents.

In my judgment, the law is that if harbouring is actionable at all, it is not actionable at the suit of the wife. I hold, therefore, that the defendant did not, by continuing to support Lord Winchester, interfere with the plaintiff's rights.

[His Lordship then considered the other two heads of breach and, having found that the defendant had either directly or indirectly financed Lord Winchester in the prosecution of the petition, held that that amounted to an interference within the meaning of the contract.]

Judgment for the plaintiff.

Solicitors: *Theodore Goddard & Co.; Gordon, Dadds & Co.*

J. F. L.

[7] [1952] A.C. 716; [1952] 2 T.L.R. 246; [1952] 2 All E.R. 394.

NOTE.

[QUEEN'S BENCH DIVISION.]

GOTTLIEB *v.* GLEISER.

[1952 G. No. 1997; 1954 G. No. 1604.]

1955
Feb. 21, 22,
23, 28;
Mar. 1, 2,
3, 4.

Denning L.J.
(sitting as an
additional
judge).

Enticement—Husband and wife—Whether action by husband will lie against mother-in-law.

ACTION.

On March 12, 1946, the plaintiff, Isaac Gottlieb, a medical practitioner, married the daughter of the defendants, Samuel Gleiser and his wife, Dinah Gleiser. After the marriage the plaintiff and his wife lived in Sheffield where, in December, 1946, their first child was born. On several occasions the plaintiff's mother-in-law came to Sheffield and stayed with them. There was a strong bond of affection between the mother-in-law and the wife and the mother-in-law was protective of the wife. The plaintiff expected a great deal of the wife and there was tension between him and the mother-in-law. When the wife became ill the mother-in-law became anxious about her and distrustful of the plaintiff, and during the visits of the mother-in-law the tension between her and the plaintiff increased. Finally, in December, 1948, when the wife was ill and the mother-in-law staying, the plaintiff left the house. A day or so later he came back and, after a talk, it was agreed that he and the wife should separate and that the wife and child should go with the mother-in-law to London. On January 3, 1949, the plaintiff saw them off from the station. The plaintiff and the wife met on several occasions during the next two months, but the wife took up the line that she would not return to the plaintiff and attempts at reconciliation failed. In May, 1949, the plaintiff had the child out for the day and took him abroad and finally to Israel. In July, 1949, the second child of the marriage was born, and in the following February the wife went to Israel, where she obtained a court order for the return to her of the eldest child, and after the child had been handed over to her she returned with him to the home of her parents. The wife then instituted divorce proceedings against the plaintiff on the ground of cruelty, which the plaintiff successfully defended. In August, 1952, while those proceedings were pending, the plaintiff issued the first of the writs in the present actions in which he claimed damages for enticement of his wife against the mother-in-law and for receiving his wife and harbouring her against both the mother-in-law and father-in-law. The actions were consolidated.

The plaintiff appeared in person.
David Weitzman Q.C. and *S. Seuffert* for the defendants.

DENNING L.J. stated the facts and continued: After that story of the history between these parties, the upshot of it is that in my judgment the mother-in-law was unduly protective of the daughter. She sought to carry into the daughter's adult life the care and protection which she had bestowed on her as a child. She forgot, or if she did not forget, she did not realize, that when her daughter was married the best thing was to leave the husband and the wife alone and to interfere as little as possible. I think that she interfered too much. It was done out of devotion to her daughter, and it was done through a sense of protecting her, but she interfered too much. But, on the other hand, I think that the plaintiff has a good deal to reproach himself for. He was determined to get his own way in the house so far as the wife and child were concerned. I think that he did lack kindness and consideration for her which might have made all the difference and made her withstand the interference of her mother. He did not appreciate or make allowances for the wife's weaknesses, and it was partly his own conduct which resulted in the mother-in-law wanting to throw protection and care around her daughter. I think that those are two of the reasons for the break-up of this marriage. But, on the other hand, I think that this marriage would probably have continued as marriages do, even though there was not the kindness and consideration there should have been, had it not been for the tension between the mother-in-law and the husband. That tension and that interference brought things to breaking point; the husband could not stand it any longer, and that is why he left the house and agreed to the separation and told them to leave.

Now how does it stand in law? In most of the States of the United States of America they allow an action to be brought for what is called "alienation of affections." We know no such action in this country, nor is it to be desired. If a husband is to keep the affection of his wife he must do it by the kindness and consideration which he himself shows to her. He must put his faith in her, trusting that she will be strong enough to thrust away both the possessiveness of her parents and the designs of would-be lovers. If she is weak and false to her trust, the harm done cannot be righted by recourse to law; nor is money any compensation. The only thing for the husband to do is to set to work as best he can to mend his broken life, a task in which these courts cannot help him. But although the law of England does not permit an action for alienation of affections, it does allow an action for enticement. Even this action is not in keeping with the times; it is a survival from the days when the wife was considered to be the property of her husband. She was regarded as little better than the servant in his house. If anyone deliberately and maliciously persuaded her to leave him, the husband could recover damages for the loss of her services and companionship. This is still the law in this respect. The husband can still sue the wife's paramour who entices her away from him. That was established by the Court of Appeal in *Place* v. *Searle*,[1] where the doctor said to the wife: "Come on, Gwen. We will go." The converse has also been held: that the wife can sue the husband's mistress if the mistress entices the husband away. But this action for an enticement is an anomaly which the House of Lords have said should not be extended. They said so in *Best* v. *Samuel Fox & Co. Ltd.*[2] I do not know that the rule has ever been extended so as to enable a husband to sue his mother-in-law for enticement. An action against parents-in-law has been allowed in America but, so far as I am aware, not in this country, and I do not think that it should be started now. When a man takes to himself a wife, he takes her parents to be his parents and they become his parents-in-law; he becomes part of their family. In this new situation the infirmities of human nature are such that stresses and strains are often set up without any malice on either side. The mother-in-law may be unduly possessive of her daughter and seek to protect her from the unkindness, as she regards it, of the husband. The wife may be immature and unduly reliant on her mother, instead of placing her trust in her husband, as she ought to do. These psychological defects may break up the marriage and cause the wife to leave the husband. But I do not think that this should be made the subject of an action for damages. It is altogether unseemly that families should bring these troubles into the courts of law. Take this very case. I have had to inquire into things which happened nine years ago, such as whether the mother telephoned the daughter too often whilst they were on their honeymoon, how many times the mother-in-law visited the house in Sheffield, whether she knocked before taking in the early morning tea, whether she gave the child a chocolate biscuit when the husband had said that he ought not to have had it, and so forth. The rights and wrongs of these matters are outside the realm of law altogether. They come under the realm of the domestic relations of the family, which they must work out themselves. As Atkin L.J. said in *Balfour* v. *Balfour*[3]: "The parties themselves are advocates, judges, "courts, sheriff's officer and reporter. In respect of these promises each "house is a domain into which the King's writ does not seek to run, "and to which his officers do not seek to be admitted." Even if an action for enticement did lie against the mother-in-law, however, it would, I think, be a good defence for her to show that all that she did was done, as she believed, for the good of her daughter and not out of any malice towards her daughter's husband. She may have been unduly possessive, interfering and unreasonable, but so long as she was honestly acting, as she believed, for her daughter's good, she is not liable to an action in law. The husband could not succeed against her in any case unless he could prove that she was actuated by express malice, a thing very difficult to prove.

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[1] [1932] 2 K.B. 497; 48 T.L.R. 428.

[2] [1952] A.C. 716; [1952] 2 T.L.R. 246; [1952] 2 All E.R. 394.

Applying those principles to this case, I am satisfied here that the mother-in-law did not persuade or advise her daughter to leave the husband; the wife left because the husband told her to go. When the husband changed his mind and wanted her back, the mother-in-law did not persuade her or advise her to stay, nor did the father-in-law; the wife stayed because she was determined not to go back to her husband. When the husband did the grievous wrong of taking the child away, he destroyed what little hope there was of any reconciliation. The wife, in an attempt to get the child back, offered to rejoin the husband wherever he was, but he refused because he was determined to avoid any chance of having the child taken away from him. In all the long history which I have recounted, it seems to me that these

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[3] [1919] 2 K.B. 571, 579; 35 T.L.R. 476, 609.

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subsequent actions of the husband bear out the assessment of character which I said in the beginning is exhibited during his married life; he had a hard streak in him, he was determined to get his own way, and he failed to treat his wife with the kindness and consideration which would have kept her. I believe that it was because he failed to show her that kindness and consideration that the mother-in-law interfered, and she no doubt was guilty of faults on her side. She was unduly possessive and unduly protective of the daughter. Those are all troubles that arise, as I have said, owing to the infirmities of human nature. In my judgment, they do not give rise to an action at law, and the claim therefore must be dismissed.

Judgment for the defendants.

Solicitors: *Miller, Clayton & Co.*

J. F. L.

C. C. A.

1958
Jan. 13, 14.

Lord Goddard C.J., Hilbery and Salmon JJ.

REGINA *v.* SPRIGGS.

Criminal Law—Murder—Diminished responsibility—Direction to jury —Attention of jury drawn to exact terms of section 2 (1) *of the Homicide Act,* 1957*—Whether duty of judge to define diminished responsibility—Homicide Act,* 1957 (5 *&* 6 *Eliz.* 2, *c.* 11), *s.* 2.

Parliament has enacted in section 2 (1) of the Homicide Act, 1957, what is to amount to diminished responsibility and, therefore, when such a defence is raised it is a sufficient direction if the judge draws the attention of the jury to the exact terms of the section, tells them that it contains the tests which they are to apply and leaves it to them to decide whether on the evidence the case comes within the section or not; it is not the duty of the judge to define or re-define the definition enacted by Parliament or to draw distinctions between intellect and emotion.

Diminished responsibility is an expression borrowed from the Scottish common law, which recognizes that a man might be not quite insane but a border-line case and that that amounted to diminished responsibility, and, in the same way as the question whether there is a disease of the mind in a case where a defence of insanity is raised, the question of diminished responsibility is a question of fact for the jury.

H.M. Advocate v. *Braithwaite,* 1945 S.C.(J.) 55 applied.

APPEAL against conviction.

The appellant, John Francis Spriggs, was convicted at Birmingham Assizes before Jones J. of the capital murder by

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shooting of Harold Cuningham, a barman, and was sentenced to death. At the trial one of the defences put forward was that the appellant was suffering from diminished responsibility within the meaning of section 2 of the Homicide Act, 1957.[1] In summing up the judge read section 2 of that Act to the jury, told them that it was for them to decide whether or not the appellant was suffering from such an abnormality of mind as to substantially impair his mental responsibility, and then reviewed the evidence on that issue.

The appellant appealed against his conviction on, inter alia, the following grounds: (1) that the judge had failed to give to the jury any or any sufficient direction as to the meaning of the expressions "abnormality of mind" or "mental responsibility" in section 2 (1) of the Act of 1957; (2) that the judge had failed to give the jury any or any sufficient direction that each of the following conditions came within the meaning of the expression "abnormality of mind" in section 2 (1), namely, emotional instability, temperamental instability, gross personality disorder, psychopathic personality, emotional immaturity, abnormality of control of the emotions, and immature personality; and (3) that the judge had failed to rule sufficiently or at all upon the submissions of law made by counsel for the prosecution that none of the conditions set out above or any combination of them came within the meaning of the expression "abnormality of mind" in section 2 (1), but that "abnormality of mind" was limited to deficiency of intelligence.

Graham Swanwick Q.C. and *C. H. Durman* for the appellant. At the trial, counsel for the prosecution stressed in his speech to the jury that "abnormality of mind" in section 2 (1) of the Homicide Act, 1957, was limited to deficiency in intellect and could not include the various types of mental condition from which the appellant had suffered for a long time; it was put by the prosecution that the appellant had a high intelligence quotient and could not therefore be suffering from abnormality of mind. But there was medical evidence which showed that there was a lack of ability on the part of the appellant to control his emotions, and it is submitted that conditions of the kind from which he was suffering do come within the ambit of section 2 (1). The inference from the judgment of this court in *Reg.* v. *Dunbar* [2] is that evidence that a person is a psychopath, that is, a person unable to control his emotions, is evidence on which it can be found that that person is suffering from abnormality of mind. The jury should have been directed that it is not right to equate " mind " with intellect, which is only one of the functions of the mind.

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[1] Homicide Act, 1957, s. 2: "(1) "Where a person kills or is a party "to the killing of another, he shall "not be convicted of murder if he "was suffering from such abnormality "of mind (whether arising from a "condition of arrested or retarded "development of mind or any in- "herent causes or induced by disease "or injury) as substantially impaired "his mental responsibility for his acts "and omissions in doing or being a "party to the killing."

[Lord Goddard C.J. Parliament has defined what is necessary to establish the defence of diminished responsibility. This doctrine has been borrowed from the law of Scotland. Their Lordships of the Judiciary have always had difficulty in explaining it to the jury.]

Had Parliament intended to limit the defence given by the section to cases where there was defect of reason, they would have used the phraseology of the M'Naughten rules. The accepted view of modern thought is that the seat of the control of the emotions is in the mind: see the definition of " mind " in the Shorter Oxford English Dictionary, 1st ed. (1933), Vol. 1, p. 1253: " III. 1. The seat of consciousness, thoughts, volitions, " and feelings; . . . 2. In the restricted sense: The intellectual " powers, as dist. from the will and emotions. . . ."

The submission for the prosecution was that it is the restricted meaning which is intended by the section, but it is submitted that it is not that, but the first meaning, which is appropriate. " Abnormality of mind " postulates a standard of normality, and when rival submissions as to the standard to be applied have been made, the jury should have been given some direction as to which standard they are to apply. There was evidence that a person might be normal intellectually but thoroughly unstable emotionally, and all the medical witnesses agreed that the appellant was suffering from abnormality of mind to some degree; rival submissions as to the standard to be applied had been made and therefore the jury should have been given some guidance and direction as to which standard to apply.

It was indicated in the summing-up that the fact that the appellant was supposed to be an intelligent man was something which the jury had to remember in deciding whether it was his mind or his emotions which were affected; that indication was a

[2] Ante 1; [1957] 2 All E.R. 737.

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misdirection, for, in view of the submissions made, it might have led the jury to conclude that "abnormality of mind" related to intellect only.

R. K. Brown for the Crown was not called upon.

Lord Goddard C.J., giving the judgment of the court. The appellant was convicted before Jones J. at the last Birmingham Assizes of capital murder and sentenced to death.

The circumstances relating to the case were that the appellant, who certainly had a history showing that he was of a somewhat unstable character, on the day in question went to a public-house and was turned out by the barman because he was interfering with some of the barrels and fittings of the public-house. Later, after closing time, he came back and knocked at the door, and when the barman who had turned him out opened the door to him he drew a revolver and shot him. Then, when the man lay on the ground, he fired two further bullets into him. He ran away and was found suffering from an overdose of some barbiturate he had taken, but when he had recovered from the effects of this overdose he said to police officers who were watching him in hospital: "It was the way he shoved me about. I "was mad. I collected my gun and let him have it." He knew quite well what he had done and he gave the reason why he had done it.

The defence that was put forward on his behalf was that he was suffering from diminished responsibility within the meaning of section 2 of the Homicide Act, 1957. The grounds of appeal put forward are that the judge did not give a sufficient direction as to the meaning of the expression "abnormality of mind" or "mental responsibility," and did not distinguish to the jury between emotional instability or gross personality disorder, and so forth.

Section 2 (1) of the Homicide Act, 1957, provides: "Where a "person kills or is a party to the killing of another, he shall not "be convicted of murder if he was suffering from such "abnormality of mind (whether arising from a condition of "arrested or retarded development of mind or any inherent "causes or induced by disease or injury) as substantially impaired "his mental responsibility for his acts and omissions in doing or "being a party to the killing."

The course which the judge took in summing up this matter was this: There were prepared and handed to the jury the terms of the section so that they could see it, and the judge told the jury that it was for them to decide whether or not the appellant suffered from such an abnormality of mind as to substantially impair his mental responsibility, and to enable them to come to that decision the judge went meticulously and carefully through the evidence given on one side and the other. Let me say at once that he was quite right, and no one suggests otherwise, to leave that question to the jury because there was evidence which might have justified the jury in finding, if they had taken that view, that this was a case of diminished responsibility, as it is called, and therefore finding in favour of the appellant. But the evidence was not such as to compel the jury to find that way; there was evidence on the other side and we cannot see that a judge dealing with this matter can do more than to call the attention of the jury to the exact terms of the section which Parliament has enacted and leave them to say whether upon the evidence they are satisfied that the case comes within the section or not. When Parliament has defined a particular state of things, as they have defined here what is to amount to diminished responsibility, it is not for judges to re-define or to attempt to define the definition. The definition has been laid down by Parliament and it is a question then for the jury. It is a question of fact in any particular case as to whether the jury find that the defendant's evidence brings him within the section or whether it does not.

This conception of diminished responsibility is a novelty in English law. It is borrowed from the Scottish law, where it has apparently always been part of the common law of Scotland. I see that I was reported yesterday [1] as having said, and no doubt I did, that the Lords of Justiciary in Scotland had always had difficulty in explaining this matter to a jury. Perhaps that might be thought to be not quite polite to the Scottish judges, but what I meant was that the Scottish judges have always found that it is a difficult matter to explain to the jury and a difficult matter for the jury to understand exactly what "diminished responsi-"bility" means. When I said that I had in mind *H.M. Advocate* v. *Braithwaite*,[2] where Lord Cooper, Lord Justice-Clerk, gave this charge to the jury with regard to diminished responsibility [3]: "Now, I have got to give you the most accurate instruction I can "on this delicate question. The Solicitor-General read to you a

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[1] *The Times*, Jan. 14, 1958.

[2] 1945 S.C.(J.) 55.

[3] Ibid. 57.

"passage from the charge of the Lord Justice-Clerk in the case of "*H.M. Advocate* v. *Savage*,[4] and I am going to read a sentence or "two again, because it seems to me to give as explicit and clear a "statement of the sort of thing which you have to look for as I "can find. He says[5]: 'It is very difficult to put it in a phrase'— "and I respectfully agree—'but it has been put in this way; "'that there must be aberration or weakness of mind; that there "'must be some form of mental unsoundness; that there must "'be a state of mind which is bordering on, though not amount- "'ing to, insanity; that there must be a mind so affected that "'responsibility is diminished from full responsibility to partial "'responsibility—in other words, the prisoner in question must "'be only partially accountable for his actions.' And then he "adds: 'And I think one can see running through the cases that "'there is implied . . . that there must be some form of mental "'disease.' The matter has been put in different words by other "judges. I notice in a later case[6] that the condition was referred "to for short as 'partial insanity'; and that this was explained "as meaning 'that weakness or great peculiarity of mind which "'the law has recognized as possibly differentiating a case of "'murder from one of culpable homicide.' And, finally, to give "you one last test, the question as put by the late Lord Clyde "in the same case, quoting from a charge to a jury by Lord "Moncrieff, was stated thus[7]: 'Was he, owing to his mental "'state, of such inferior responsibility that his act should have "'attributed to it the quality not of murder but of culpable "'homicide?' You will see, ladies and gentlemen, the stress "that has been laid in all these formulations upon weakness of "intellect, aberration of mind, mental unsoundness, partial "insanity, great peculiarity of mind, and the like. I am "emphasizing that just now because I shall have to revert to it "when I come to say a word about the evidence we have heard "today from Dr. Harrowes; but meantime, with those passages "in your mind, I can only say to you that that is the sort of "thing you have got to look for in the evidence led in support "of this defence. If you can find enough to justify such a con- "clusion, your verdict should be one of culpable homicide only. "If, on the other hand, you cannot find enough in the evidence "to justify such a conclusion, then I have to tell you that, so

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[4] 1923 S.C.(J.) 49.

[5] Ibid. 51.

[6] *Muir* v. *H.M. Advocate*, 1933 S.C.(J.) 46, 49.

[7] Ibid. 48.

"far as this issue is concerned, you must steel yourselves to do "your sworn duty by returning a verdict of guilty of murder."

It will be seen there that the Lord Justice-Clerk is not going into nice distinctions between mind and emotion or intellect and emotion, and one has to remember, after all, that juries are not drawn from university professors or university dons. They are ordinary men and women, and would not it be only confusing them if one went into metaphysical and philosophical distinctions between what is emotion and what is intellect and matters of that sort. The fact is that this section is borrowed from the Scottish law, and the Scottish law, as the Lord Justice-Clerk points out, recognizes that a man may be not quite mad but a border-line case, and that is the sort of thing which amounts to diminished responsibility. If a man sets up a defence of insanity, it has always been for the jury to find whether or not he is suffering from a disease of the mind. There is no test you can lay down other than the test laid down in the M'Naughten Rules, but first of all you have to find that there is a disease of the mind. That can only be done by listening to the medical evidence and the facts of the case and coming to a conclusion whether what the man did was the act of a sane man or of an insane man. So here it seems to the court that all that a judge can do is to read the section to the jury and say: "That is what Parliament "has said will amount to diminished responsibility and justify a "verdict of manslaughter and not a verdict of murder." We do not know of any better way of instructing the jury on this very difficult point than saying: "That is what Parliament has said. "Those are the tests you have to apply. You are to consider "whether he has abnormality of mind"—and how you are to define that I do not know because it is very difficult to say what is a normal person, where is the norm—"whether arising from a "condition of arrested or retarded development of mind or "any inherent causes or induced by disease or injury. If you "can find any of those matters in the evidence, then you will "find a verdict of manslaughter and not a verdict of murder." After all, in English law we are all very accustomed to the expression: "What would be the act of a reasonable man?" Has anyone ever attempted to define what is a reasonable man? We do not know of any definition of what is a reasonable man. The fact is that a jury have to decide for themselves whether the action in question is the action of what they would call a reasonable man. So here, we think the matter was entirely one for the jury. The judge put the case to the jury in the only way it can be put, and it is not the duty of the judge to enter into metaphysical distinctions such as Mr. Swanwick in his very attractive address to us on behalf of the appellant sought to persuade us was the duty of the judge, and, for the reasons I have endeavoured to give, this appeal fails and is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

J. F. L.

HILL *v.* BAXTER.

1957
Dec. 5, 6, 19.

Lord Goddard C.J., Devlin and Pearson JJ.

Road Traffic—Dangerous driving—Automatism—Defence of—Relevance of intention—Burden of proof—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *ss.* 11 (1), 49 (*b*).

Criminal Law—Insanity—Automatism—Dangerous driving—Defence that accident occurred in state of automatism—Defence of insanity not raised—Burden of proof.

Criminal Law—Practice—Medical reports—To be strictly proved.

Burden of Proof—Criminal case—Dangerous driving—Defence of automatism.

The defendant drove a motor-van across a road junction at a fast speed, ignoring an illuminated "Halt" sign, and collided with a motor-car. The van then continued for a short distance and overturned. Later, in hospital, the defendant said that he could not remember what happened. On charges of dangerous driving contrary to section 11 (1) of the Road Traffic Act, 1930, and of failing to conform to a traffic sign contrary to section 49 (*b*) of that Act, the only evidence for the defence was that of the defendant himself, but, the prosecution having no objection, the justices allowed two reports from a doctor, who had examined the defendant, to be put in, these showed no abnormality and it was impossible to say whether the defendant had had a "black out" or not. The defendant contended that he became unconscious as a result of being overcome by a sudden illness. The justices found that the defendant must have exercised skill in driving in order to reach the road junction, but were of opinion that he was not conscious of what he was doing for some little time before reaching the junction and was not capable of forming any intention as to his manner of driving; accordingly, they dismissed the charges:—

Held, that the Act of 1930 contained an absolute prohibition against dangerous driving and that the defendant's intention as to the manner of driving was immaterial; that if the onus rested on the defence of proving a state of automatism they had failed to do so, and as the facts showed that the defendant was driving and driving dangerously, the justices had come to a wrong conclusion in law.

Dictum of Humphreys J. in *Kay* v. *Butterworth* (1945) 61 T.L.R. 452, 453 considered.

Per Lord Goddard C.J. There may be cases where the circumstances are such that the accused could not really be said to be driving at all; for example, if he had a stroke or an epileptic fit.

Per Devlin and Pearson JJ. Even in a case in which liability depended on full proof of mens rea it would not be open to the defence to rely on automatism without providing some evidence of it.

Per Pearson J. In any ordinary case when once it has been proved that the accused was in the driving seat of a moving car, there is, prima facie, an obvious and irresistible inference that he was driving it. No doubt on that point will arise unless and until there is evidence tending to show that by some extraordinary mischance he was rendered unconscious or otherwise incapacitated from controlling the car.

Per curiam: Agreed medical reports have no place in criminal courts; evidence must be given on oath and be subject to cross-examination unless there is a statutory exception allowing documents or certificates to be put in as evidence.

CASE STATED by Brighton justices.

On May 24, 1957, two informations were preferred by the prosecutor, Thomas Richard Hill, against the defendant, Kenneth Baxter, that he drove a motor-van in a manner which was dangerous to the public, contrary to section 11 (1) of the Road Traffic Act, 1930, and that he failed to conform to a traffic sign, contrary to section 49 (*b*) of the Act.

The justices heard the informations on June 19, 1957, and found the following facts:

At about 10.45 p.m. on April 12, 1957, the defendant was driving a motor-van from east to west in Springfield Road, Brighton, towards the junction of that road and Beaconsfield Road. On the south pavement of Springfield Road and 98 feet east of that road junction there was a "Halt" sign, which at the material time was illuminated. The defendant failed to stop in accordance with the sign and drove straight across the road junction at quite a fast speed until his van came into collision with a motor-car which was being driven northwards in Beaconsfield Road. After the collision the defendant's van carried on for a short distance and then overturned. A police constable arrived at the scene of the accident at 10.50 p.m. and saw the defendant, who was in a dazed condition and suffering from cuts to his head. The defendant was taken to hospital where the police constable saw him about one hour after the accident. The defendant then said: "I remember being in Preston Circus going to Withdean. "I don't remember anything else until I was searching for my "glasses. I don't know what happened." After caution, the defendant said: "I cannot remember a thing." The defendant remembered nothing from the time when he was at Preston Circus until the events subsequent to the accident. The defendant intended to go to Withdean from Preston Circus, and he had made a substantial and unnecessary detour by driving into Springfield Road. The defendant must have exercised skill in driving in order to reach Springfield Road from Preston Circus by whatever route he had taken.

It was contended by the prosecutor that the defendant was guilty of the offences.

It was contended by the defendant that he became unconscious as a result of being overcome by a sudden illness while driving at Preston Circus and that he was not therefore liable at criminal law. It was further contended that against the background of the medical reports in evidence and in view of the unlikelihood of retrograde amnesia having resulted from the accident when the defendant was conscious immediately thereafter, the loss of memory could only be attributed to the defendant being overcome by illness without warning of its onset.

The justices were of opinion that the defendant was not conscious of what he was doing after leaving Preston Circus, with the implication that he was not capable of forming any intention as to his manner of driving. They believed the defendant was speaking the truth when he said that he could not remember what had happened after leaving Preston Circus, and accepted the submission of his counsel that the defendant was "unconscious" at the time of the accident, and, accordingly, they dismissed the informations.

The prosecutor appealed.

Duncan Ranking (*Anthony Harmsworth* with him) for the prosecutor. There was no evidence before the justices on which they were entitled to dismiss the informations, and in doing so they came to a perverse finding. Having found that the defendant had exercised skill in driving in order to reach Springfield Road, they could not at the same time form the opinion that he

L. Devlin's assertion.

was unconscious during that time. In both *Kay* v. *Butterworth* [1] and *Henderson* v. *Jones* [2] the defence that the defendant had fallen asleep while driving was held not to avail him on a charge of careless driving. In the present case there was no evidence of illness before the accident and therefore the finding of the justices was unreasonable.

John Alliott for the defendant. The justices came to a correct decision. The court is bound by findings of fact, and to find that the justices acted perversely it is necessary to say that they came to a decision which no reasonable bench could have come to: *Bracegirdle* v. *Oxley*.[3] In *Kay* v. *Butterworth* [4] Humphreys J. suggested that a person who, through no fault of his own, became unconscious while driving should not be made liable at criminal law; if, for example, he was overcome by a sudden illness. Here, it is admitted that the defendant was driving, but the submission is that he was driving in a state of automatism, and that far from having any mens rea he had no mens at all. In *Morris* v. *Marsden* [5] Stable J. expressed the opinion that if a person in a condition of complete automatism inflicted grievous injury, that would not be actionable because of the lack of the necessary intention. Driving in the full sense must include mental ability, and in the present case the defendant was not driving in that sense because his mind was not directing his actions. The justices rightly came to the conclusion that after losing consciousness the defendant was driving only in the sense that he was behind the steering wheel and his muscles were operating it. The position is the same as a man who dies while at the wheel.

Cur. adv. vult.

December 19. The following judgments were read.

LORD GODDARD C.J. This special case stated by justices for the County Borough of Brighton concerns two informations preferred against the respondent, the first for the dangerous driving of a motor-vehicle contrary to section 11 (1) of the Road Traffic Act, 1930, and the second for failing to conform to a "Halt" sign contrary to section 49 (*b*) of the Act. The facts found by the justices are that at 10.45 p.m. on the evening of

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[1] (1945) 61 T.L.R. 452.

[2] (1955) 119 J.P. 304.

[3] [1947] K.B. 349; 63 T.L.R. 98; [1947] 1 All E.R. 126.

[4] 61 T.L.R. 452, 453

[5] [1952] 1 T.L.R. 947; [1952] 1 All E.R. 925.

April 12, 1957, the respondent drove a motor-van along Springfield Road, Brighton, in a westerly direction and where that road crosses Beaconsfield Road he ignored an illuminated "Halt" sign, drove across the road junction at a fast speed and came into collision with a car which was being driven northwards in Beaconsfield Road. The respondent's van then carried on for a short distance and overturned. A police constable arrived and found the respondent in a dazed condition and at the hospital to which he was taken he said: "I remember being in Preston "Circus going to Withdean. I don't remember anything else "until I was searching for my glasses. I don't know what "happened." The justices found that to be in Springfield Road on the way to Withdean from Preston Circus involved a substantial and unnecessary detour, but that the respondent must have exercised skill in driving in order to reach Springfield Road by whatever route he took. The justices apparently accepted the respondent's evidence and found that he remembered nothing from the time when he was at Preston Circus till the accident had happened. They were of opinion that the respondent was not conscious of what he was doing after leaving Preston Circus, and to this finding they add the words "with the implication "that he was not capable of forming any intention as to his "manner of driving." They dismissed the informations, accepting a submission that loss of memory could only be attributed to the respondent being overcome by illness without warning.

There was no evidence for the defence other than that of the respondent himself, but it seems that, as the prosecution did not object, the justices allowed two letters from a doctor, who had examined the respondent, to be put in. This was quite irregular; agreed medical reports so often used in civil actions have no place in criminal courts. Evidence must be given on oath and be subject to cross-examination unless there is a statutory exception allowing documents or certificates to be put in as evidence, as, for instance, under section 41 of the Criminal Justice Act, 1948. The justices have referred to these letters in the case, so we have looked at them. They are certainly in no way favourable to the respondent; the consultant neurologist who examined the respondent could find no trace of illness or abnormality. He said in his first report that he had had an E.E.G.—that is some form of encephalogram—done and was going to examine the respondent again when the report would be through in a fortnight's time. In his further report on May 2 the doctor said that the report showed no abnormality, and that from a medical point of view it was impossible to say whether he had "a black out" or not. So there is no medical or scientific evidence of any illness at all.

The first thing to be remembered is that the Road Traffic Act, 1930, contains an absolute prohibition against driving dangerously or ignoring "Halt" signs. No question of mens rea enters into the offence; it is no answer to a charge under those sections to say: "I did not mean to drive dangerously" or "I did not notice "the 'Halt' sign." The justices' finding that the respondent was not capable of forming any intention as to the manner of driving is really immaterial. What they evidently mean is that the respondent was in a state of automation. But he was driving and, as the case finds, exercising some skill, and undoubtedly the onus of proving that he was in a state of automation must be on him. This is not only akin to a defence of insanity, but it is a rule of the law of evidence that the onus of proving a fact which must be exclusively within the knowledge of a party lies on him who asserts it. This, no doubt, is subject to the qualification that where an onus is on the defendant in a criminal case the burden is not as high as it is on a prosecutor.

The main contention before us on the part of the appellant was that there was no evidence on which the justices could find that the respondent was in a state of automatism or whatever term may be applied to someone performing acts in a state of unconsciousness. There was in fact no evidence except that of the respondent, and while the justices were entitled to believe him, his evidence shows nothing except that after the accident he cannot remember what took place after he left Preston Circus. This is quite consistent with being overcome with sleep or at least drowsiness. That drivers do fall asleep is a not uncommon cause of serious road accidents, and it would be impossible as well as disastrous to hold that falling asleep at the wheel was any defence to a charge of dangerous driving. If a driver finds that he is getting sleepy he must stop.

The justices, no doubt, were greatly influenced by the dictum, and it is only a dictum, of Humphreys J. in *Kay* v. *Butterworth*.[1] In that case the judge, after emphasizing that drowsiness or sleep would be no excuse, said[2] that "he did not mean "to say that a person should be made liable at criminal law who "through no fault of his own became unconscious while driving; "for example, if he were struck by a stone or overcome by a

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[1] (1945) 61 T.L.R. 452.

[2] Ibid. 453.

"sudden illness; or the car was temporarily out of control by his "being attacked by a swarm of bees." I agree that there may be cases where the circumstances are such that the accused could not really be said to be driving at all. Suppose he had a stroke or an epileptic fit, both instances of what may properly be called acts of God; he might well be in the driver's seat even with his hands on the wheel, but in such a state of unconsciousness that he could not be said to be driving. A blow from a stone or an attack by a swarm of bees I think introduces some conception akin to novus actus interveniens. In this case, however, I am content to say that the evidence falls far short of what would justify a court holding that this man was in some automatous state. There was no evidence that he was suffering from anything to account for what is so often called a "black out," and which probably, if genuine, is epileptic in origin. Nor was there any evidence that he had ever had an attack of this description before. As I have said above, his own evidence, and that is all there was, is consistent with having fallen asleep, or having his mind full of other matters and not paying proper attention. It is obvious that a defence of automatism is, in effect, saying that the accused did not know or appreciate the nature and quality of his actions; it is getting very near a defence of insanity. It may be that in homicide cases attention may have to be given to the matter where diminished responsibility is set up. In the present case I am content to rest my judgment on the ground that there was no evidence which justified the justices finding that he was not fully responsible in law for his actions, and that his intention was immaterial as there was here an absolute prohibition. I would allow the appeal.

I desire to say, in view of some discussion at the hearing, that this is certainly not a case of a perverse finding by the justices, who obviously considered the case with great care and anxiety. The question asked by the justices is answered in the negative and the case must go back with a direction to convict. The penalty is a matter for the justices, but we have no doubt they will bear in mind the view of the neurologist as to the fitness of the defendant to drive.

Devlin J. I agree that if the onus lies upon the defence to produce some evidence of automatism, they have failed to do so, with the result that the justices came to a wrong conclusion in law. I do not find it necessary, before deciding whether there is such an onus, to determine just what part automatism plays in liability for crime. It is a novel point that would require careful consideration; the answer would certainly depend, among other things, upon the nature of the liability which the prosecution had to establish.

I am satisfied that even in a case in which liability depended upon full proof of mens rea, it would not be open to the defence to rely upon automatism without providing some evidence of it. If it amounted to insanity in the legal sense, it is well established that the burden of proof would start with and remain throughout upon the defence. But there is also recognized in the criminal law a lighter burden which the accused discharges by producing some evidence, but which does not relieve the prosecution from having to prove in the end all the facts necessary to establish guilt. This principle has manifested itself in different forms; most of them relate to the accused's state of mind and put it upon him to give some evidence about it. Thus the fact that an accused is found in possession of property recently stolen does not of itself prove that he knew of the stealing. Nevertheless, it is not open to the accused at the end of the prosecution's case to submit that he has no case to answer; he must offer some explanation to account for his possession though he does not have to prove that the explanation is true: *Rex* v. *Aves.*[3] In a charge of murder it is for the prosecution to prove that the killing was intentional and unprovoked, and that burden is never shifted: *Woolmington* v. *Director of Public Prosecutions.*[4] But though the prosecution must in the end prove lack of provocation, the obligation arises only if there is some evidence of provocation fit to go to the jury: *Holmes* v. *Director of Public Prosecutions.*[5] The same rule applies in the case of self-defence: *Reg.* v. *Lobell.*[6] In any crime involving mens rea the prosecution must prove guilty intent, but if the defence suggests drunkenness as negativing intent, they must offer evidence of it, if, indeed, they do not have to prove it: *Director of Public Prosecutions* v. *Beard.*[7] It would be quite unreasonable to allow the defence to submit at the end of the prosecution's case that the Crown had not proved affirmatively and beyond a reasonable doubt that the accused was at the time of the crime sober, or not sleepwalking or not in a trance or black out. I am satisfied that such matters ought not to be considered at all until the defence has produced at least prima facie evidence. I should wish to reserve for future consideration when necessary the question of where the burden ultimately lies.

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[3] [1950] 2 All E.R. 330; 34 Cr. App.R. 159.

[4] [1935] A.C. 462; 51 T.L.R. 446.

[5] [1946] A.C. 588; 62 T.L.R. 466; [1946] 2 All E.R. 124.

[6] [1957] 1 Q.B. 547; [1957] 1 All E.R. 734.

[7] [1920] A.C. 479, 507; 36 T.L.R. 379.

As automatism is akin to insanity in law there would be great practical advantage if the burden of proof was the same in both cases. But so far insanity is the only matter of defence in which under the common law the burden of proof has been held to be completely shifted.

In my judgment there is not to be found in the case stated evidence of automatism of a character which would be fit to leave to a jury. It must be remembered that the justices were required to presume that the accused was not suffering from any disease of the mind, since he did not challenge the legal presumption of sanity. Although he was asserting that he did not know the nature and quality of his act and so, inevitably, that he was suffering from a defect of reason or understanding, he was not saying that he was a victim of any disease of the mind. Unless there was evidence which showed that his irrationality was due to some cause other than disease of the mind, the justices were not entitled simply to acquit.

I agree that the conclusion which this court has reached does not mean that the justices have acted in any way perversely. We have been told that the chairman of the justices was a medical man, and it may be that he felt able to draw inferences from the evidence which are not apparent to a layman. But judges of all kinds sit as laymen and not as experts, and verdicts of all kinds must be given according to the evidence. I do not doubt that there are genuine cases of automatism and the like, but I do not see how the layman can safely attempt without the help of some medical or scientific evidence to distinguish the genuine from the fraudulent.

I have drawn attention to the fact that the accused did not set up a defence of insanity. For the purposes of the criminal law there are two categories of mental irresponsibility, one where the disorder is due to disease and the other where it is not. The distinction is not an arbitrary one. If disease is not the cause, if there is some temporary loss of consciousness arising accidentally, it is reasonable to hope that it will not be repeated and that it is safe to let an acquitted man go entirely free. But if disease is present, the same thing may happen again, and therefore, since 1800,[8] the law has provided that persons acquitted on this ground should be subject to restraint. The acquittal is now given in the illogical and disagreeable form of the verdict "Guilty but insane," and while it seems right that in such a case some conditions should be imposed, the only restraint known to the law is indefinite detention in what used to be called a criminal lunatic asylum. So it would be very surprising to find this defence raised in answer to charges under the Road Traffic Act, 1930. Whatever the theory of the law may be, mental disease is in practice not available as an excuse for the commission of any of the lesser crimes. I agree with the order proposed.

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[8] See Criminal Lunatics Act, 1800.

PEARSON J. I agree with the judgment of the Lord Chief Justice subject to the reservation and explanations which Devlin J. has made with regard to the burden of proof in a case such as this. The prosecution have to prove on the major charge in this case that the accused was driving dangerously. On the facts, if he was driving at all he was unquestionably driving dangerously, and therefore the question at issue was and is whether he was driving the car. In any ordinary case, when once it has been proved that the accused was in the driving seat of a moving car, there is, prima facie, an obvious and irresistible inference that he was driving it. No dispute or doubt will arise on that point unless and until there is evidence tending to show that by some extraordinary mischance he was rendered unconscious or otherwise incapacitated from controlling the car. Take the following cases: (1) The man in the driving seat is having an epileptic fit, so that he is unconscious and there are merely spasmodic movements of his arms and legs. (2) By the onset of some disease he has been reduced to a state of coma and is completely unconscious. (3) He is stunned by a blow on the head from a stone which passing traffic has thrown up from the roadway. (4) He is attacked by a swarm of bees so that he is for the time being disabled and prevented from exercising any directional control over the vehicle, and any movements of his arms and legs are solely caused by the action of the bees. In each of these cases it can be said that at the material time he is not driving and, therefore, not driving dangerously. Then suppose that the man in the driving seat falls asleep. After he has fallen asleep he is no longer driving, but there was an earlier time at which he was falling asleep and therefore failing to perform the driver's elementary and essential duty of keeping himself awake and therefore he was driving dangerously. Similarly, in the case of a man who knows that he is liable to have an epileptic fit but, nevertheless, drives a vehicle on the road, there is a question of fact whether driving in these circumstances can properly be considered reckless or dangerous. The answer might depend to some extent on the degree and frequency of the epilepsy and the degree of probability that an epileptic fit might come upon him.

For the purpose of construing the word " drive " in section 11 one can have regard to the language of section 15 of the same Act. The opening words of section 15 before it was amended by the Road Traffic Act, 1956, were: " Any person who when " driving or attempting to drive, or when in charge of, a motor " vehicle on a road or other public place is under the influence " of drink or a drug to such an extent as to be incapable of " having proper control of the vehicle, shall be liable . . ." In this case there is a clear finding that the respondent was driving and driving with skill. It is said in the case: "The respondent " intended to go to Withdean from Preston Circus, and he had " made a substantial and unnecessary detour by driving into " Springfield Road. The respondent must have exercised skill " in driving in order to reach Springfield Road from Preston " Circus by whatever route he had taken." The importance of the finding that he was driving with skill is the necessary implication that he was controlling the car and directing its movements. Therefore, he was driving, and his driving was dangerous. The offence was committed and there is no evidence to support the acquittal. If in the material respect the burden of proof was on the prosecution, they discharged it by showing that the respondent was driving, and if the burden of proof was on the defence they failed to prove an extraordinary mischance rendering it impossible for the respondent to control the car and direct its movements. I agree with the proposed order.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co. for W. O. Dodd, Brighton; Jolly & Co., Brighton.*

J. D. P.

C. A.

1957
Dec. 17.

Romer and Ormerod L.JJ.

CROSS *v.* EDEY.

[No. of Matter 77A.]

County Court—Payment into, by order of High Court—Payment out—Discretion of judge—Widow's damages under Fatal Accidents Acts—County Courts Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 164 (3).

Fatal Accidents Acts—Damages—Payment into county court—Payment out.

In 1943 the plaintiff's husband was killed in an accident and she was awarded the sum of £890 as damages under the Fatal Accidents Acts. The High Court, who tried the case, ordered that sum to be paid into the county court pursuant to the provisions of section 164 (3) of the County Courts Act, 1934, and it was directed that such sum should be invested and interest at 3¼ per cent. per annum should be paid to the plaintiff. The plaintiff, who was 46 years of age, had had some business experience. Her only child was 19 and earning her own living. The plaintiff applied to the county court judge for payment out to herself of the balance of the fund in court, which amounted to £740, to enable her to buy a freehold house, which was then subject to a statutory tenancy, or, alternatively, to enable her to invest that sum at a higher rate of interest. The county court judge refused to direct payment out of the moneys to her:—

Held, (1) that it was impossible for the court to interfere with the way in which the county court judge had exercised his discretion in refusing to sanction the payment out of the fund to the plaintiff, bearing in mind, as he did, that for relevant purposes he was administering the fund in the same way as he would administer it for an infant.

(2) That assuming that there was a right of appeal from the exercise by a county court judge of the discretion vested in him by section 164 of the County Courts Act, 1934, it would need a strong case to justify the Court of Appeal in interfering, since it was the intention of the legislature that money recovered by a widow, which was ordered to be paid into the county court, should be administered by the county court for her benefit as distinct from any paid to her for her own use and benefit, and that to hold that a widow, who was free from outside interference and without dependent children, was entitled, as of right, to have her money paid out to her would be to abrogate the discretion which Parliament had vested in the county court judge.

Per curiam, that where a High Court judge is exercising the discretion conferred on him by R.S.C., Ord. 22, r. 14 (4) and (9), in respect of damages awarded to a widow under the Fatal Accidents Acts, it would be right to allow a widow to have the damages which she had recovered paid to her where no special circumstances were established which rendered such a course undesirable.

APPEAL from Judge Paton, sitting at Bridgwater County Court.

The plaintiff, Queenie Mary Cross, a widow, appealed against a refusal of the county court judge pursuant to the powers conferred on him by section 164 of the County Courts Act, 1934,[1] to direct payment out to herself of the sum of £740 lodged in court in 1943 for her benefit and representing damages awarded to her under the Fatal Accidents Acts.

The following statement of facts is taken from the judgment of Romer L.J.: The plaintiff in 1943 brought an action against one Edward James Edey and G. Hooper & Co. Ltd., by reason of a fatal accident to her husband: she sued as his widow, and recovered, by way of damages under the Fatal Accidents Acts, a sum of £890. That action was in the High Court, and the judge who tried it made an order transferring that sum into the Bridgwater County Court. In the same action the plaintiff's infant child, a daughter, was awarded a sum of £249 as damages, and that sum also was transferred into the same county court. With regard to the plaintiff's fund, the direction was that it should be invested and that the interest should be paid half-yearly to the plaintiff until further order. With regard to the infant's sum of £249, it was ordered that that should be invested and the income accumulated.

The funds remained there for some years without any application being made with regard to them. On October 21, 1954, the registrar of the Bridgwater County Court made an order for payment out of £30 from the infant's fund for her maintenance; and on September 27, 1956, he made a further order for payment, out of the infant's fund, of £160 for the purchase for her of a small motor-scooter, to enable her to travel to her work. The plaintiff's daughter was at the date of the hearing 19 years of age. On October 21, 1954, the registrar also made an order for the payment to the plaintiff out of her own fund (which then stood at £898) of £150 for her to purchase a small car. Those orders provided both the plaintiff and her daughter means of transport for their personal use.

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[1] County Courts Act, 1934, s. 164: "(1) Where in any cause or matter "in the King's Bench Division of "the High Court money is in any "manner recovered by or on behalf "of, or adjudged or ordered to be "paid to or for the benefit of, a "person who is an infant or of "unsound mind, the High Court or "a judge thereof may order the "money or any part thereof to be "paid into or transferred to the "county court of the district in "which that person resides or such "other county court as the High "Court or judge may order. (2) On "the making of any such order, the "money . . . shall be . . . transferred . . . and shall, subject to "any special order or direction of "the High Court or a judge thereof . . . be invested, applied or "otherwise dealt with for the benefit "of the person to whom the order "relates in such manner as the "county court in its discretion thinks "fit. (3) The provisions of this "section shall apply to money which "in proceedings under the Fatal "Accidents Acts, 1846 to 1908, is "recovered by or adjudged or "ordered to be paid to the widow "of the person killed as they apply "to money recovered by or adjudged "or ordered to be paid to an infant."

On June 18, 1957, the plaintiff applied in person to the registrar for the payment out of the whole of her fund (which stood at £740, together with some interest), in order that she might purchase a house as an investment, subject to an existing tenancy. The registrar (according to his note) suggested that she should instruct a solicitor to appear before him and told her that he would need very full information from the solicitor as to the property—the terms of the existing tenancy and the terms of the proposed contract of purchase. Thereupon the plaintiff instructed a solicitor who, on the adjourned hearing in July, 1957, brought up the matter again before the registrar. The solicitor was not in a position to give any of the information which the registrar required about the house in question, and the registrar was not prepared to make any order. The solicitor (who had so far limited his application to one for payment out for the purpose of buying a house) then suggested that if there was any difficulty about that the registrar should deal with the application simply on the footing that the plaintiff wished to have the whole fund paid out to her, so that she could invest it to better advantage and at a better rate of interest than the 3½ per cent. that it was earning in court. The registrar refused to make such an order and adjourned the matter to the judge.

It appeared from an affidavit of the solicitor that when the matter came before the judge on September 12, he repeated the arguments which he had placed before the registrar. He informed the judge that the plaintiff was a woman aged approximately 46, that she assisted her mother and did the greater part of the work in the conduct of a licensed house, that what moneys she had earned she had invested in land and in the local building society, and that she was in every way a business woman, fully capable of looking after her own interests to the best advantage. The solicitor then pointed out that the purchase of this particular house (which was a freehold house, No. 39, Kellerton Road, Lewisham) would, in the particular circumstances which existed, be a highly profitable transaction. The reason for that was this: The property was let to one Slade, aged some 63 years, who was an old friend of the plaintiff. He and his wife were the sole occupants of the property and he intended to leave the house and move down to the West Country in two years' time, when he reached retiring age. It was put by the solicitor to the judge that when that happened (as there was every reason to suppose it would) this house would then be worth some £2,000, because, although it was rent-controlled, it could be sold, on the tenant vacating it, with vacant possession. The judge then (according to his note) wanted to know some more about the house, and the application was adjourned till November 14, 1957, to give opportunity to the plaintiff and her solicitor to supply some further information. On the adjourned hearing (according to the judge's note), the solicitor was unable to furnish any further information about the premises proposed to be purchased; but it appeared that he had misinformed the judge about the rateable value, with the result that the premises would not be decontrolled under the Act of 1957.

The judge having taken the view that he was not proposing to authorize this particular transaction, the solicitor then asked him if he would make an order for the moneys to be invested in gilt-edged stock dated for redemption in a few years' time, and said that the plaintiff would, if necessary, undertake that it would not be dealt with for five years; and he added that the 5 per cent. stock would be a great deal more to the plaintiff's advantage than the $3\frac{1}{4}$ per cent. The solicitor in his affidavit said that when the judge was not inclined to make an order, he asked him if he would adjourn the matter so that he could obtain a special valuation about the house: but that was not in fact obtained by the time the adjourned hearing came before the judge. The judge refused either to make a particular order for the release of this money in order to pay for the house or the more general order releasing the fund to the plaintiff, so that it might be invested at a more profitable rate of interest. It is from that refusal that this appeal was brought. The plaintiff desired to have the control of the fund either for the purpose of buying the house or for the purpose of reinvestment at a more favourable rate of interest.

Roger Gray for the plaintiff. This is an appeal by the plaintiff from a refusal of the county court judge to exercise a discretion vested in him by section 164 of the County Courts Act, 1934, and to direct payment out to her of the moneys awarded to her in 1943 by way of damages under the Fatal Accidents Acts. It is submitted that the judge exercised the discretion vested in him unjudicially and that he was wrong in law: *Grimshaw* v. *Dunbar*.[2] There is no comprehensive guide as to the principles on which a judge should exercise the discretion vested in him by section 164. The discretion is the same as that conferred by R.S.C., Ord. 22, r. 14 (4) and (9), on judges of the High Court. Upjohn J., in *Smith* v. *Boulton & Paul Ltd.*,[3] a similar case, in exercising that discretion, expressed the opinion that the damages awarded to a widow under the Fatal Accidents Acts should be paid out to her. The plaintiff is a widow without dependent children. Such a widow should be entitled to have her moneys paid to her, except where it appears that she is unbalanced, incompetent, or is under the influence of some undesirable person. Today Ord. 22, r. 14, is intended to protect widows from other persons, not from their own incompetence. While it is not suggested that the control of the court should be removed, it is submitted that the power to retain such damages in court should be sparingly exercised. [Reference was made to *Taylor* v. *Cheltenham and Hereford Breweries Ltd.*[4]] A widow with young children is in a different position to one whose children have all grown up.

The judge should have taken into consideration the hardship on a woman of adult years in not being able to use her moneys as she wishes. Further, in the present case the damages are invested at 3¼ per cent. The plaintiff should be allowed to invest her money so that she will get a higher rate of interest. It is not for her benefit that these moneys should remain in court. The judge adopted an incorrect principle in deciding that because he did not think that it was in the plaintiff's best interests to purchase this house that he must refuse the application on that ground alone. County court judges should approach the question whether, in the exercise of their discretion under section 164, moneys should be paid out to a widow in the same way as High Court judges do when exercising their discretion under Ord. 22, r. 14 (4) and (9), to order payment in. There is no provision in the Fatal Accidents Acts which requires that damages awarded to a widow shall be retained in court. If the submission as to the general principle which should be applied is incorrect, it is submitted that in this particular case the judge, on the facts before him, was plainly wrong in refusing to order payment out to the plaintiff and that this appeal should be allowed.

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[2] [1953] 1 Q.B. 408; [1953] 1 All E.R. 350.

[3] *The Times*, Oct. 25, 1957.

[4] [1952] 2 Q.B. 493; [1952] 1 T.L.R. 1224; [1952] 1 All E.R. 1135.

ROMER L.J. stated the facts and read the relevant parts of section 164 of the County Courts Act, 1934, and continued: Mr. Gray has put his case before us in two ways. First of all, he says that, on the particular facts of this case, it was a highly profitable transaction which the judge was asked to authorize, and that the judge went wrong in refusing to approve the purchase which the plaintiff desired to effect. The second way he puts it, which is a wider way, is this: that a lady such as the plaintiff, who is middle-aged and has some business experience, and whose only child has almost attained her majority, and who is free, so far as can be known, from the domination of any other person, should be entitled, in the absence of special circumstances, to be paid out the money which stands to her credit or which has been paid, for her benefit, into the county court.

So far as the first way of putting the matter is concerned, I think that (subject to the wider question, which I consider later) there is no possible ground for interfering with the way in which the county court judge exercised his discretion. He was not satisfied that he had sufficient information about this property and about the lessor's and lessee's covenants under the tenancy agreement and other material matters to enable him to say whether this was going to be, or likely to be, a sound investment or merely a hopeful speculation. In those circumstances, and especially having regard to the statement in the judge's note that, on the adjourned hearing, the plaintiff's solicitor was unable to furnish any further information about the premises proposed to be purchased, it seems to me impossible for this court to say that he erred in refusing to sanction the payment out of this money for the purpose of purchasing this house, bearing in mind, as he did bear in mind, that for relevant purposes he was administering this fund in the same way as he would administer it for the benefit of an infant; and that no court would direct an investment of an infant's money in the purchase of a house property without knowing a great deal more about the tenancy, to which the property was subject, than the county court judge knew in the present case. I can see no ground, therefore, for interfering in any way with the judge's refusal so far as the property is concerned. It is true (as Mr. Gray says) that even if the tenant does not go out, as it is hoped that he will, the money invested in the house will still be there as an investment.

I cannot believe that the county court judge overlooked that: I think that he regarded this thing as something of a speculation in a property which he did not know enough about.

With regard to the more general way of putting the case, Mr. Gray in effect asked us to say that where a lady of this kind is not shown to be illiterate or unbalanced or under the dominion of some evilly disposed person, she ought to be allowed at any time to have unqualified possession and dominion over money which has been paid into court for her benefit, the object (as he says) of the provisions as to administering such funds contained in section 164 being not to protect a widow against herself but to protect her from the influence of other people. He says that the county court judge in the present case overlooked, or disregarded, the facts that the fund at present is only bringing in 3¼ per cent.; that the daughter is 19 years old and in a job; and that the lady, now 46, is competent to manage her own affairs, and possesses business experience. He says, accordingly, that in those circumstances the judge was wrong in refusing to exercise his discretion by directing the payment out of this fund to her.

I am prepared to assume that there is a right of appeal from the exercise by a county court judge of the discretion vested in him by section 164; but it seems to me that it would need a very strong case to justify this court in interfering. Certainly I am by no means disposed to lay down any such general proposition as that for which Mr. Gray contended. It seems to me that such a proposition would be quite inconsistent with the terms in which section 164—which took its origin from the Judicature Act of 1925—is expressed, because subsection (3) applies the section to widows generally and not only to widows with infant children; and it obviously was the intention of the legislature that money recovered by a widow, which was ordered to be paid into court, should be administered by the county court for her benefit as distinct from being paid to her for her own use and benefit; and if we were to say that a lady, who is free from outside interference and who has either no children or no infant children, or only children who have practically attained their majority, ought to be entitled as of right to have her money paid out to her, it seems to me that that in effect would be completely abrogating the discretion which Parliament has vested in the county court judge, and would be going much further than this court has any right to go.

It seems to me that each case must depend on its own particular facts. Here, the registrar saw the plaintiff. I do not know whether the county court judge saw her: she was presumably in court at the hearing before him. Both the registrar and the county court judge came to the conclusion that no proper case had been established to their satisfaction for releasing this fund to the plaintiff for her own use and benefit. It appears to me that we have no material before us on which we can say that they exercised their discretion wrongly; although it may well be (I do not know) that had the matter come before us in the first instance we would have taken a different view of the matter. With regard to that, Mr. Gray drew our attention (as, indeed, he drew the attention of the county court judge) to what Upjohn J. had to say in a somewhat similar matter in a case [1] which he decided when he was sitting as an additional judge of the Queen's Bench Division. Sitting in that court, he awarded £4,826 damages to a Mrs. Smith, aged 45, under the Fatal Accidents Acts, in an action which she brought in respect of the death of her husband. Her counsel asked the judge to order payment of some of the damages to her forthwith. Upjohn J. took, and expressed, the view that "A person is perfectly "entitled to take their damages out, and regrettably they are "entitled, if they so desire, to fritter it away"; and added, "Having seen Mrs. Smith, I think she would be the last person "in the world to do this." He then directed that the money should be paid out to Mrs. Smith, less £600 for the two children. He was exercising a discretion (very comparable to that which the county court judge was exercising in this case) conferred by Ord. 22, r. 14 (4) and (9). Other judges have taken a similar view to that expressed by Upjohn J.; but it appears to me that that does not assist in the present case. We are not exercising an original discretion, as he was: we are being asked to interfere with the exercise of the original discretion which is vested in the county court judge, and very different considerations arise. I, for my part, would only say this: I respectfully agree with what Upjohn J. said, and it does appear to me that where one finds a case such as the present, prima facie it would be right to allow a widow to have the damages which she has recovered, and that normally that would be the wise and sensible course to adopt, where no special circumstances are established which render such a course undesirable—for example, the influence of some third person or the existence of infant children or the like. But my opinion on that is really irrelevant for present purposes, because all we are asked to do is to interfere with and overrule the exercise of the county court judge's discretion in the circumstances of this case as he saw them. In my opinion there is not sufficient material for us so to do; and I would accordingly dismiss the appeal.

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[1] *The Times*, Oct. 25, 1957.

Ormerod L.J. I agree, although I have considerable sympathy with the plaintiff in this appeal. The appeal is one from a county court judge who has made an order in the exercise of his discretion under section 164 of the County Courts Act, 1934. It appears to be clear that in the case of an exercise of a discretion by a county court judge in those circumstances there may be an appeal, but only in exceptional circumstances, where the decision has resulted in an injustice being done. It appears to be quite clear (although I personally might feel disposed to come to a different conclusion on the facts) that it is a matter for the exercise of the discretion of the county court judge vested in him by statute; and, unless there is some circumstance which would enable this court to say that an injustice has been done, because there has clearly been a wrongful exercise by the judge of his discretion, it does not appear to me that this court has any right to interfere.

Mr. Gray, on behalf of the plaintiff, put his case in two ways. In the first place, he referred to the scheme itself for the purchase of this house and submitted that, on any showing, this was a scheme which was for the benefit of the plaintiff—that whatever happened to the house in the future, whether there was vacant possession in two years or not, the house would still have its value and the money would not be lost, and that under those circumstances the proper exercise by the county court judge of his discretion would have been to allow this money to be spent on this house. That is one way of looking at it. On the other hand, of course, it means this, that if the judge had allowed this money to be paid out for this specific purpose the court would then have lost control of the money completely: the house would be in the possession and ownership of the plaintiff; she would be entitled to realize it at any moment and, of course, would have complete control of the proceeds of sale. It may or may not be that that is a matter which was in the mind of the county court judge at the time he came to his conclusion. Be that as it may, I think it is quite impossible to say here that it was an improper exercise of the discretion of the county court judge for him to decide that this was not, in the circumstances, a suitable way of expending this money on behalf of the widow.

On the other ground which Mr. Gray has put forward, he would have this court find that the discretion vested in the county court judge could really only be exercised in one way in a case of this kind, where the widow has reached the age of 46 years, and where the infant is now almost of age; and that really under no circumstances, unless some exceptional circumstance, such as the domination of an evilly disposed person, could be found, should an application be refused. For my part, I am quite unable to accept that view, and would be a long way from laying it down as a rule that the discretion of the county court judge should be exercised in that way. Apart from anything else, it would be taking away his discretion entirely in a matter of this kind. It may very well be that the modern idea is that a widow should have possession of money to deal with as she thinks best, that in these days women are more experienced than they were in the past in handling their own affairs; and it may be that with increasing frequency a judge in the High Court will order moneys to be paid direct to widows under these circumstances rather than order that they should be transferred to the county court and invested under section 164. But that is entirely a matter for the High Court judge in each particular case, and it is not a matter in which this court can interfere, so far as I am able to see. Although, as I say, if I had been considering these circumstances myself, I might have come to a different conclusion, I find it quite impossible to say that there has been such a wrongful exercise by the county court judge of his discretion that this court should interfere. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Gregory, Rowcliffe & Co. for Barrington & Sons, Bridgwater.*

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Nov. 13, 14, 26.

Lord Evershed M.R., Romer and Ormerod L.JJ.

DERBYSHIRE MINERS' WELFARE COMMITTEE *v.* SKEGNESS URBAN DISTRICT COUNCIL.

Rates and Rating—" Social welfare "—Health—Miners' welfare holiday camp—Trustees occupying premises used for " purpose of a holiday " centre . . . for the benefit of " coal miners, their dependants and invitees—Provision of cost-price holidays—Organization not established or conducted for profit—Whether " social welfare "—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*).

The trustee committee occupied a holiday camp and premises on trust to " permit the . . . premises to be used for the purpose of " a holiday centre and a recreation or pleasure ground for the " benefit of workers in or about coal mines employed by collieries " in the Derbyshire District (including the dependants and invitees " of the said workers)." The premises consisted, inter alia, of chalets; a kitchen and dining-hall; a theatre and children's theatre; bars, lounges, tea bars and a billiards room; a bowling-green, skating-rink and gardens; a dormitory for young children; and other ancillary buildings. The only persons attending the holiday camp were workers in or about coal mines in the district of Derbyshire (excluding South Derbyshire), their wives, children and invitees. The holidays were provided at cost price, the committee seeking to make neither a profit nor a loss on their operations. The funds for the establishment of the camp had been provided out of statutory compulsory contributions levied on the coal industry under Acts of Parliament, and grants for capital expenditure were made by the Social Welfare Organization set up under the Miners' Welfare Act, 1952. The committee claimed to be entitled to the benefit of the rating relief provided by section 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, on the ground that they were an organization not established or conducted for profit and whose main objects were charitable or " otherwise concerned " with the advancement of . . . social welfare " within the meaning of section 8 (1) (*a*):—

Held, (1) that in considering whether the provision of the camp in question, which was, admittedly, the main object of the non-profit making scheme, was concerned with the " advancement of . . . " social welfare " within the meaning of section 8 (1) (*a*), it was not material to inquire whether the cost of setting up the camp was provided voluntarily or under statutory or other compulsion; further that the camp was not provided as a matter of business.

National Deposit Friendly Society Trustees v. *Skegness Urban District Council* [1957] 2 Q.B. 573; [1957] 3 All E.R. 199 distinguished.

(2) That existence of the camp was in itself an " advancement " of social welfare in the relevant sense.

(3) That the beneficiaries of the scheme, that is, the coal miners of the district, their dependants and invitees, constituted a sufficiently wide class to entitle the committee to relief under the section.

Oppenheim v. *Tobacco Securities Trust Co.* [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31 distinguished.

Decision of Divisional Court [1957] 1 W.L.R. 764; [1957] 2 All E.R. 405 affirmed.

APPEAL from the Divisional Court (Lord Goddard C.J., Hilbery and Donovan JJ.).

The trustees of the Derbyshire Miners' Welfare Convalescent Home and Holiday Centre (generally referred to as the Derbyshire Miners' Welfare Committee and hereinafter called "the "committee") were shown in the rate book for the year ended March 31, 1956, as the occupiers of a hereditament in Skegness described as "holiday camp and premises" with a rateable value of £1,476, and the amount of the rate was shown as £1,758 18s. In the rate book for the following year the rateable value of the premises was shown as £3,800 and the amount of the rate as £3,040. The committee, by notice given under section 4 of the Poor Relief Act, 1743, appealed against that rate on the grounds that the provisions of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955,[1] applied to the hereditament; that the rate was not made in conformity with that section in that the amount charged or to be charged exceeded the amount permitted by the section; and that the amount of rates charged or to be charged ought to have been limited to £1,758 18s.

The facts found by Quarter Sessions for Lincoln (Parts of Lindsey) and contained in the case stated for the opinion of the Divisional Court are set out in the report of that decision.[2] Quarter sessions decided against the committee, but on appeal the Divisional Court reversed that decision and decided that the main objects of the committee were concerned with the advancement of social welfare within the meaning of section 8 (1) (*a*), and that they were, accordingly, entitled to the relief claimed. The rating authority appealed.

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[1] Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8: "(1) This section applies to . . . "(*a*) any hereditament occupied for "the purposes of an organization ". . . which is not established or "conducted for profit and whose main "objects are charitable or are other-"wise concerned with the advance-"ment of religion, education or social "welfare; . . . (2) For the purposes "of the making and levying of rates ". . . for the year beginning with "the date of the coming into force "of the first new valuation list . . . "the amount of rates chargeable in "respect of a hereditament to which "this section applies shall . . . be "limited as follows . . . (*a*) for the "first year of the new list, the amount "so chargeable shall not exceed the "total amount of rates (including any "special rates) which were charged "in respect of the hereditament for "the last year before the new list "came into force; . . ."

[2] [1957] 1 W.L.R. 764, 765.

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The relevant provisions of the lease under which the committee, as lessees, held the hereditament are set out in the judgment of the court.

Sir Arthur Comyns Carr Q.C., *C. E. Scholefield* and *J. D. James* for the rating authority. Section 8 of the Act of 1955 was intended to give relief to bodies which were in the popular, if not the legal, sense charitable. "Social welfare" as used in the section involves some element of benevolence; the funds in support must be derived substantially from voluntary contributions, in the sense in which "voluntary" is used in *British Launderers' Research Association* v. *Hendon Borough Rating Authority*.[3] None of the funds of the committee in the present case was derived from voluntary contributions. Most of the benefits were paid for by the beneficiaries themselves. The rent was admittedly subsidized from the welfare fund, but that fund was founded on a statutory levy, and, further, the rent was infinitesimal when compared with the total outgoings. There is no evidence whether the services of the trustees were given free or not, and the onus of proving that they were given voluntarily is on the committee. In the absence of evidence it may fairly be assumed that those of the trustees who were officials of the National Coal Board were detailed to perform these functions as part of their work with the board. There is nothing in this case which introduces an eleemosynary element.

Section 8 (1) must be looked at as a whole, and although it might be contended that social welfare is capable in other contexts of a very wide meaning, paragraphs (*a*) and (*b*) indicate that it was used in a restricted sense to exclude at least the matters mentioned in those paragraphs; it is not open in this court to contend that the expression should be construed ejusdem generis with those which precede it, but the point is reserved should the case go further.

The carrying on of this camp was a business, the outgoings of which were, to an overwhelming extent, provided by the beneficiaries themselves. They could not go there unless they paid. Although this was a non-profit-making concern, that does not prevent it from being a business: *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*[4] (in the

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[3] [1949] 1 K.B. 434, 462; 65 T.L.R. 103; sub nom. *British Launderers' Research Association* v. *Central Middlesex Assessment Committee and Hendon Rating Authority* [1949] 1 All E.R. 21.

[4] [1957] 1 Q.B. 531; [1957] 1 All E.R. 407.

Divisional Court). Being a business is not, of course, incompatible with being concerned with social welfare, but it is a pointer in the opposite direction. This case is quite different from *General Nursing Council for England and Wales* v. *St. Marylebone Borough Council.*[5] It seems that the council was an emanation of the Crown and could have claimed exemption from rating on that ground, but the National Coal Board is not the Crown.

This camp is not provided with the object of the "advancement" of social welfare. In the *National Deposit* case[6] it was accepted that there is a relevant distinction between provision and advancement. For example, a co-operative butcher may be concerned with the provision of meat, but not with advancing it in the sense that an agricultural research society might be. If this camp is concerned with the provision of the welfare of these people it does not necessarily follow that it is concerned with the advancement of social welfare. The section is designed to help bodies who are concerned with propagating something, not merely providing it.

[ROMER L.J. "Advancement" must be construed in the same way in relation to social welfare as to religion and education. It would be impossible to say that a body concerned with actual education was not advancing education because they were actually providing it.]

To come within the provision the object of the body must be to spread social welfare. [Reference was made to *Berry* v. *St. Marylebone Borough Council*[7] and *Gilmour* v. *Coats.*[8]]

Even if, contrary to the foregoing submissions, the camp is concerned with the advancement of the welfare of the miners, it is not concerned with "social" welfare. As in *Oppenheim* v. *Tobacco Securities Trust Co.*,[9] the class of beneficiaries is not wide enough. They are the miners in a particular district and the committee is not concerned with their well-being as members of society. The holiday camp was something which was designed to make them better as employees in the particular industry—a policy often followed by private employers. There is evidence supporting the finding of fact by quarter sessions in favour of the rating authority on this point. The committee have not shown

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[5] [1958] Ch. 421.

[6] [1957] 2 Q.B. 573; [1957] 3 All E.R. 199.

[7] [1957] 1 W.L.R. 495; [1957] 1 All E.R. 681; affirmed [1958] Ch. 406.

[8] [1949] A.C. 427; 65 T.L.R. 234.

[9] [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31.

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that in fact the class was numerically larger than that in the *Oppenheim* case.[9] It is true that Lord Simonds in that case reserved his opinion on employees in a nationalized industry, but that was in relation to workers in an industry as a whole. The present class is narrower than that. There is no evidence as to what proportion the North Derbyshire miners form of the employees of the National Coal Board.

J. D. James following. The rent paid was an unimproved ground rent, and the cost of the buildings was defrayed by a grant from the welfare fund. The charges made were supplemented by substantial profits from the shops and lounges. There was no element in this case of poverty or ill-health; the miners were not found to have been in need. The provision of holidays as such is not social welfare, though some might be governed by a general benevolent intent.

Geoffrey Cross Q.C. and *J. M. Milne* for the committee. The provision of a holiday camp in itself, in suitable circumstances, is capable of being concerned with the advancement of social welfare. The language of the section is admittedly vague, but this may be one of those cases where Parliament has been deliberately vague to avoid trouble. Parliament may have wanted to go beyond "charity" in the legal sense and to leave to the courts the limitation of the extension.

There is no need to prove an eleemosynary element or that the beneficiaries are in need. The *National Deposit* case [10] decided the ejusdem generis point in the committee's favour, and it is plain that the words following "or otherwise" are to apply to non-charitable bodies. Parliament probably had in mind the sort of circumstances in *Inland Revenue Commissioners* v. *Baddeley.*[11]

In the light of the *Oppenheim* case [12] it is not conceded that, if this had been otherwise a charity, the class would not have been sufficiently wide to support a charitable trust. But that is not the question here, for it has been the deliberate intention of Parliament to free the court from the narrow limitations of "charity" in the legal sense, and the common employment rules on which the *Oppenheim* case [12] turned are not in point here. The finding of quarter sessions on this point is not one of fact but of law. They applied the principle applicable to charities to social welfare and then made a conclusion of law. This is a social welfare activity within the Mining Industry Acts, 1920 and 1925, and it would be strange if it was not for the advancement of social welfare for rating purposes.

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[9] [1951] A.C. 297.

[10] [1957] 2 Q.B. 573.

[11] [1955] A.C. 572; [1955] 1 All E.R. 525; 35 T.C. 661.

[12] [1951] A.C. 297.

On the facts, the proportion of the finances coming from outside sources, that is, other than those provided by the miners themselves, is not negligible. The capital expenditure on the camp was provided from outside sources and no profits were made. The camp was subsidized to a substantial extent—unlike the friendly society in the *National Deposit* case.[13] The trustees received running expenses and, in the absence of contrary evidence, the inference is that they gave their services free. The Act does not say anything about the necessity for voluntary contributions, and it is unnecessary that the outside contributions should be voluntary. The test is whether, irrespective of where the money comes from, it can be said that the trustees are conducting the camp with the object of advancing social welfare.

J. M. Milne following. The example of the co-operative butcher is not apposite. There is a distinction between the provision of some concrete substance and an abstract matter for this purpose. By providing an abstract matter the body is advancing it. If a holiday camp is concerned with social welfare, by providing it, the provider is advancing social well-being, which is synonymous with social welfare.

Sir Arthur Comyns Carr Q.C., in reply, referred to *Inland Revenue Commissioners* v. *Forrest*[14] and *Manchester Unity Friendly Society* v. *Manchester Corporation.*[15]

Cur. adv. vult.

November 26. LORD EVERSHED M.R. I will ask Ormerod L.J. to read the judgment of the court.

ORMEROD L.J. This is an appeal by the Skegness Urban District Council from a decision of the Divisional Court of May 9, 1957, allowing the appeal of the Derbyshire Miners' Welfare Committee by way of case stated from the Lincoln (Parts of Lindsey) Quarter Sessions. The Divisional Court held that the committee were entitled to relief under section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

It is necessary in the first place to set out shortly the various statutory instruments and their provisions by reason of which the committee came into existence and carried out its various objects. Section 20 of the Mining Industry Act, 1920, provided for the setting up of a compulsory levy on every ton of coal mined. This was payable by the mining owners and provision was made for setting up a national committee with the necessary branch committees to administer the fund for the benefit of miners in general. By a similar Act passed in 1926, provision was made for a further levy, this time on the royalty owners, to be applied for similar purposes. It is to be noted that there was never any voluntary contribution to the fund. In 1935 the royalties were nationalized and a commission was established to administer them, which commission remained liable to pay the royalty levy. In 1947 the colliery undertakings were nationalized, and the royalties were handed over to the National Coal Board, which became liable to pay the levy of 1920 and the royalty levy.

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[13] [1957] 2 Q.B. 573.

[14] (1890) 15 App.Cas. 334; 6 T.L.R. 456.

[15] [1957] 1 W.L.R. 1059; [1957] 3 All E.R. 310.

In 1952 the Miners' Welfare Act was passed, which provided that the Miners' Welfare fund constituted under section 20 of the Mining Industry Act, 1920, should be wound up and the assets transferred as to "colliery welfare property" to the Coal Board and as to other properties to the Social Welfare Organization, which was defined by section 12 to mean the "Coal Industry "Social Welfare Organization incorporated under the Companies "Act, 1948." Section 13 of the Act provided that the board should from time to time pay to the Social Welfare Organization sums necessary to meet the estimated costs of social welfare activities, which were defined by section 16 as meaning "activities "concerned with the maintenance or improvement of the health, "social well-being, recreation or conditions of living of—(*a*) persons employed in or about coal mines," and of their dependants.

By a lease dated December 6, 1940, made between the trustees on behalf of the Derbyshire District Miners' Welfare Committee of the one part and the trustees on behalf of the Derbyshire District Miners' Holiday Centre of the other part, the lessors demised to the lessees a piece of land, together with the buildings thereon, at Seathorne, Skegness, for a term of 21 years at a yearly rent of £200. The lease contained a recital that the Miners' Welfare Committee had, on the recommendation of the District Committee, allocated the sum of £35,000 for the provision of a holiday centre for the use and benefit of workers in or about coal mines, particularly those resident in the Derbyshire district, and that the lessees had been appointed to administer the fund in accordance with the trusts declared in the lease. Clause 6 of the lease provided (inter alia) that the lessees should permit the demised premises to be used as a holiday centre and recreation and pleasure ground for the benefit of workers in or about coal mines employed in the Derbyshire district, including their dependants and invitees. Clause 9 provided that they should assess the payments from persons using the accommodation, facilities and benefits at a figure estimated to produce such a surplus on the running costs as would provide a sufficient reserve for depreciation of the trust property and for the cost of necessary repairs and renewals. It is to be noted that the trust created by the lease was the subject of an order made by the Charity Commission on February 20, 1950. Doubts have been raised as to the validity of this order and it was agreed by counsel on both sides that, for the purposes of this appeal, the powers vested in the committee were those contained in the lease.

According to the case stated, after finding that the respondents had at all material times occupied the hereditament for the purpose of a holiday centre for the use of workers in and about coal mines in Derbyshire (exclusive of South Derbyshire) and setting out a description of the premises comprising the hereditament, quarter sessions found that the camp was provided by the Social Welfare Organization and was being run by the committee, who sought to make neither a profit nor a loss in their operations.

Paragraph 8 of the case further set out as follows: " (viii) " That the only persons attending the holiday centre were " workers in or about coal mines in the district of Derbyshire " (excluding South Derbyshire), their wives and children, but " that, if all the vacancies were not filled by these persons, they " were filled by applicants from other coal fields. (ix) That " generally there were no vacancies left to be filled by applicants " from other coal fields. (x) That a charge varying from £5 15s. 0d. " for an adult to £1 10s. 0d. for a small child was made for a " week's holiday accommodation and full board, which charge " included the return rail or omnibus fare from the visitor's home " to Skegness. (xi) That drinks and other refreshments were " sold to persons staying at the holiday centre, alcoholic drinks " being acquired by such persons as members of a club and in " the winter by local residents who became members of the club. " A substantial profit was made out of the supply of drink, but " the charge for accommodation was so fixed that, taking all the " operations together, the trustees made neither a profit nor a " loss."

Quarter sessions were of opinion (a) that the provision of the holiday home for North Derbyshire miners was not a charitable object in the absence of the element of poverty or ill-health, and (b) the purposes of the trust "were not otherwise concerned with "the advancement of social welfare, because social welfare "connotes a benefit to the community and not a benefit to an "individual or to a particular class of work-people employed by "one employer." They were consequently of the opinion that the occupiers were not entitled to relief under section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and dismissed the appeal. This decision was reversed by the Divisional Court. It was not contended that the object was a charitable one.

It would appear that the questions to be answered in this appeal are: (1) Is the object of providing a holiday camp of this nature one which can be said to be "concerned with the advance-"ment of . . . social welfare"? and (2) If so, is the class of persons entitled to benefit under the scheme sufficiently wide to bring it within the provisions of the section? It has not been contended that the provision of the camp is other than the main object of the scheme or that the trust was established or conducted for profit. Unless, therefore, either of these questions should be answered in the negative, this appeal must fail.

Sir Arthur Comyns Carr, on behalf of the rating authority, puts his case in three ways. He says in the first place that the provision of the camp cannot be regarded as social welfare because (a) the funds, so far as they are not provided by the beneficiaries themselves, are provided by a statutory levy and not by voluntary contributions, and (b) that the carrying on of the camp is a business of which the outgoings are to an overwhelming extent paid by the beneficiaries themselves. As to (a), it is, of course, true that the sum of £35,000, which was originally provided for the establishment of the camp, and, as far as the evidence shows, is the only sum which has been provided, came from the Miners' Welfare fund, which was raised by means of a compulsory levy. It is difficult to see why this should make any difference. The matter to be considered is the purpose for which the funds were provided. If they were provided for a purpose which can properly be described as the advancement of social welfare, then we fail to see why it should matter whether they were provided voluntarily or under some statutory or other compulsion.

The rating authority sought to derive some support for their contention from the judgment of Parker L.J. in *National Deposit*

Friendly Society Trustees v. *Skegness Urban District Council*,[1] where he says: "It is, we think, in considering this question"—that is, the restriction of the meaning of social welfare in its widest sense—"that the persons to be benefited and the source "of the benefits become pertinent considerations." But the next sentence in the judgment, "Where the benefits are confined to "the members and where these benefits are derived entirely "from their own contributions . . . ," shows clearly why the source of the benefits had there become a pertinent consideration.

With regard to (b), the rating authority again relied on the decision in the *National Deposit* case.[2] It was argued that to an overwhelming degree the expenses of the camp were paid by those who enjoyed its benefits. Apart from the services rendered by the trustees, and, in the absence of evidence to the contrary, it is to be presumed that they were given without payment, the only benefit from the welfare fund was derived from the fact that the rent was only £200 per annum. How much this was below an economic rent of the premises was indicated by the assessment of the rateable value of the hereditaments at £3,800. No figures showing the cost of running the camp were produced either to us or to the Divisional Court, but it was argued that the advantage derived from the reduced rent when related to the total outgoings was too small to be a relevant consideration. Under these circumstances, it was submitted that the case could not be distinguished from the *National Deposit* case,[2] a case of a friendly society supported entirely by the contributions of its members who received benefits on the happening of various contingencies calculated according to the amounts of their respective contributions.

The distinction between the two cases is, in our judgment, clear. On the one hand, there is a friendly society carrying on what is in effect the business of a mutual insurance company. On the other hand, there is a committee carrying on a holiday camp on premises which have been provided otherwise than by those entitled to benefit at a cost of £35,000, so that holidays may be enjoyed at a cost not greater than that of running the camp and providing for the upkeep. It can hardly be denied that a holiday camp such as this tends to promote the happiness and general well-being of those entitled to make use of it, and it is unnecessary to attempt any precise definition in order to come to the conclusion that the object of providing this camp is one concerned with "social welfare." Some support for this view, although not necessarily conclusive, is given by the definition of "social welfare activities" contained in section 16 of the Miners' Welfare Act, 1952, to which reference has already been made.

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[1] [1957] 2 Q.B. 573, 583; [1957] 3 All E.R. 199.

[2] [1957] 2 Q.B. 573.

The second submission on behalf of the rating authority was that, even if the provision of the holiday camp was to be regarded as concerned with social welfare, the object of providing it could not be regarded as the "advancement of . . . social welfare." Sir Arthur based his argument on the analogy that the co-operative butcher "provided" meat, but did not in any way "advance" it, as might a body concerned with agricultural research, and that "advancement" as used in this section must connote an element of propaganda or some similar element rather than the mere provision of benefits. It may well be that the provision of food or other commodities by a tradesman may not come within the meaning of advancement, but the provision of an amenity such as this one is on a very different footing, and this holiday camp by its very existence can be said to "advance" social welfare by improving the lot of those persons entitled to take advantage of it. As we see it, therefore, the first question must be answered in the affirmative. The provision of a holiday camp of this nature is one which can be said to be "concerned with "the advancement of . . . social welfare."

The second question (that is, whether the class of persons entitled to benefit is wide enough to bring the object within the section) was the subject of the appellants' third submission. According to the case stated, the opinion of quarter sessions was that it was not so wide, because, to quote from the findings in the case, "social welfare connotes a benefit to the community "and not a benefit to an individual or to a particular class of "work-people employed by one employer." It would appear that the opinion of quarter sessions on this question was based upon the rule in *Oppenheim* v. *Tobacco Securities Trust Co.*,[3] where it was held that a settlement directing trustees to apply certain income "in providing for . . . the education of children "of employees or former employees of a British limited company "or any of its subsidiary or allied companies" did not satisfy the test of public benefit requisite to establish it as charitable, even though the employees so indicated numbered over 100,000, the nexus between the persons in the group being employment by particular employers.

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[3] [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31.

It is to be noted that the question then being decided was whether the trust was charitable, a consideration which does not arise in this case, and Lord Simonds in his speech[4] leaves open a case such as this, where the persons entitled to benefit are employees in a nationalized industry.

If the view taken by quarter sessions is the correct one, it would mean that no scheme for the benefit of miners which would otherwise be for the advancement of social welfare could come within the section, even though the persons entitled to benefit constituted the whole of the persons employed in the mining industry. We cannot accept that view as the correct one. Each case must be decided on its own facts, the question being whether the persons to be benefited form a sufficiently substantial part of the community, measured by common-sense standards, to fulfil the implication of the word "social" as used in the section.

Donovan J., in his judgment in the Divisional Court, said[5]: "For my part, I think the coal miners of Derbyshire, their "dependants and their invitees, if they are the only beneficiaries "of this scheme, do constitute a sufficiently large and important "section of the community for the present purpose." We agree with the view there expressed.

It was argued on behalf of the appellants that the question was one of fact, and that the finding of quarter sessions was in their favour. Reference has already been made to the words used by quarter sessions in coming to their decision on this part of the case. It is true that they found that "to confer a benefit "on some of the servants of the National Coal Board by the "provision of a summer holiday at cost is not sufficiently wide "to constitute the advancement of social welfare"; but this finding must be read with the preceding sentence, where the opinion was expressed that "social welfare" connotes a benefit to the community and not to an individual or a particular class of work-people employed by one employer. For the reasons already given, this does not appear to be the correct approach to the question and, if paragraph (b) of the opinion does contain a finding of fact, then, in our view, it is based on a misdirection.

We would, therefore, answer the second question in the affirmative and hold that the class of persons entitled to benefit is

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[4] [1951] A.C. 297, 307, 308.

[5] [1957] 1 W.L.R. 764, 773.

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sufficiently wide to entitle the committee to relief under the section, and it follows that this appeal should be dismissed.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Wrentmore & Sons for Ivor M. Cule, Clerk to the Skegness Urban District Council; Lawrence C. Jenkins, Arnold, near Nottingham.*

E. D.

1957
Nov. 4, 5, 6, 7.

Donovan J. and a jury.

GRECH *v.* ODHAMS PRESS LTD. AND ANOTHER.
ADDIS *v.* SAME.

[1956 G. No. 1840.]
[1956 A. No. 2020.]

Libel and Slander—Libel—Newspaper—Absolute privilege—Statement made by witness at criminal trial—Comment made in newspaper —Statement false—Whether plea of fair comment lay.

Where a statement made by a witness in judicial proceedings is reported and commented on in a newspaper, the fact that the statement turns out to be false does not destroy a plea of fair comment in respect of comment based on it in subsequent proceedings for libel.

Mangena v. *Wright* [1909] 2 K.B. 958; 25 T.L.R. 534 considered.

ACTION.

The plaintiff, Joseph Grech, was convicted in 1954 of housebreaking. While in prison, in 1955, he wrote two petitions to the Home Secretary protesting his innocence and denouncing his solicitor, Ben Canter, a police officer, Detective-Sergeant Robertson, and another man, Morris Page. As a result, Canter, Robertson and Page were prosecuted and convicted in 1955 of endeavouring to pervert the course of justice. Grech gave evidence for the prosecution. The following day, November 30, 1955, the "Daily Herald" published the following words: "All "the dirt. At his trial Grech said the key was for his flat. And "on the order of the court, Robertson was sent to try it. He "reported that it fitted a lock there, but the jury convicted "Grech and he was sentenced to three years. There he brooded "over his belief that he had first been framed, then induced to "pay money out for the 'fiddle' and yet gaoled. With the help

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"of Jasper Addis, an ex-solicitor, one-time man of affairs to "George Dawson—and gaoled for defrauding him—Grech drew "up a petition to the Home Secretary. Into it he put all the "dirt he knew, and as a Maltese running West End flats as "brothels he thought he knew a great deal."

The plaintiffs, Joseph Grech and Jasper Addis, in a consolidated action claimed damages for libel in respect of those words against Odhams Press Ltd. and Daily Herald (1929) Ltd., the printers and publishers of the "Daily Herald." The plaintiffs alleged that by those words the defendants meant that they had made an inaccurate and dishonest report and had gratuitously disclosed to the Home Secretary scandalous allegations against other people in which they had no real belief, and that they had thereby been brought into hatred, contempt and ridicule.

By their defence the defendants admitted publication. In the case of Grech, the defendants alleged that the words formed part of a fair and accurate report of criminal proceedings and were therefore absolutely privileged; alternatively, that they were published bona fide for the information of the public and were therefore privileged; alternatively, that in as far as the words consisted of allegations of fact, they formed part of a fair and accurate report of court proceedings, and in as far as they consisted of expressions of opinion they were fair and impartial comments on a matter of public interest. In the case of Addis the defendants relied on similar defences based on privilege. Addis had not in fact assisted Grech in the preparation of his petitions.

The case is reported only on the point whether, in relation to the claim by Addis, the statement "With the help of Jasper "Addis," which was untrue, could be a basis for a plea of fair comment in respect of the words "Into it [the petition] he "[Grech] put all the dirt he knew . . ."

F. H. Lawton Q.C. and *Hugh Davidson* for the defendants. Anything said in court is absolutely privileged and as evidence was given at the trial at the Central Criminal Court—although not apparently cross-examined to—that Addis helped Grech prepare the petitions, the defendants were entitled to put that into their report. The facts mentioned in the petitions were dealt with at the trial and therefore the defendants were entitled to comment on them, provided that the comment was fair. The petitions were not read from beginning to end in open court, but were produced by counsel for the Crown and copies were available to the defendants. The greater part of the words complained of are covered by the plea of absolute privilege; and, although it is conceded that " dirt " does not appear in the transcript of the proceedings, the defendants can rely on fair comment of what was said in court to cover that word. The alternative plea is that the words were true, when one looked at the petitions and what was in them and that that was a proper description of them; alternatively, it can be said that even if not completely true, nevertheless, having regard to what was said and the allegations made in court, it is fair comment on those allegations.

As far as Addis is concerned, then inasmuch as the article states that Addis helped Grech the defendants are protected by the absolute privilege attaching to the reports of judicial proceedings because it was mentioned in evidence; and in so far as it was mentioned and commented on by the use of the word " dirt " the defence of fair comment is relied on. As to the various statements about Addis personally, it is not sought to say that they are true, but reliance is placed on the reporting powers of newspapers, and there is no issue about that.

Where in a report of court proceedings in a newspaper, a fact stated by a witness on which a comment is made by the newspaper, turns out to be false, the comment may still be fair comment. [Reference was made to *Mawe* v. *Pigott*[1] and *Mangena* v. *Wright*.[2]]

Claud Allen for the plaintiff Grech. This point does not really concern this plaintiff.

Stanley Crowther for the plaintiff Addis. *Mangena* v. *Wright*[2] does not apply to the present case at all, even by analogy. That case concerned Parliamentary papers; it specifically said that the same rules applied to a mistake in judgment.[3]

Grech was asked who helped him with the petitions and he did not mention Addis's name at all. It was then put to Page, who was subsequently convicted, and he said Grech had told him that Addis helped. The defendants are seeking to base the facts of their article on the flimsiest of matters that could be raised and they are saying that it is fair for them to comment on them.

DONOVAN J. The jury have found that the words complained of were defamatory and untrue: yet nevertheless that they were fair comment upon a matter of public interest.

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[1] (1869) I.R. 4 C.L. 54.

[2] [1909] 2 K.B. 958; 25 T.L.R. 534.

[3] [1909] 2 K.B. 958, 977.

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It is argued that those two findings are inconsistent. In my view they are not necessarily so. Otherwise, the defence of fair comment would be almost valueless; for, if the jury found that the words were not defamatory, or being defamatory were true, then the defence of fair comment would not be needed.

In the case of Addis, I have already ruled that the repetition of a statement made by a witness at the trial at the Central Criminal Court did not destroy the plea of fair comment on the ground that the statement turned out to be false. It is to be noted that what was actually said in court by the witness Page was that Grech had told him, Page, that Addis had assisted in the drawing up of the petition. In cross-examination, Grech, who was a witness, said that someone assisted him, but gave no name. Grech said that the only assistance given was to correct his grammar and punctuation. The defendants' rendering of all this in the newspaper was that Addis had helped, which no one had actually said at the trial. This was simply the inference that the paper drew from the evidence. No point has been raised, however, on this interpretation of the evidence. The argument was that, since Addis had not in fact helped, the plea of fair comment could not be sustained and that the decision in *Mangena* v. *Wright*[1] on this point was inapplicable. The reason suggested is that in that case the instances given by Phillimore J.,[2] who decided that case, of statements which were privileged although inaccurate, were errors in a Parliamentary debate, or in the judgment of a judge. But a witness's statements in the witness box are entitled to the self-same privilege: and if comment may be fair although founded on the inaccurate statement of a judge in judicial proceedings, I cannot see in principle why comment may not also be fair although founded on an inaccurate statement, similarly privileged, namely, that of a witness in judicial proceedings.

It was for that reason that I ruled as I did. Now, for the benefit of anybody else who may have to consider this case, I have repeated, at slightly greater length, the ruling which I gave.

Judgment for the defendants.

Solicitors: *Simmons & Simmons; L. Granville Jones & Co.*

C. J. E.

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[1] [1909] 2 K.B. 958.

[2] Ibid. 977.

C. A.

1957
Oct. 14.

Jenkins, Parker and Pearce L.JJ.

PHIPPS *v.* ORTHODOX UNIT TRUSTS LTD.

[1955 P. 1671.]

Practice — Pleadings — Particulars — Wrongful dismissal — Claim for special damages — Loss of remuneration — Whether particulars of taxable income must be given.

Damages—Tax element—Loss of earnings—Particulars of tax.

The plaintiff, who had been sole managing director of the defendant company, brought an action for damages for wrongful dismissal which he alleged took place on July 13, 1949. The plaintiff claimed substantial sums in respect of arrears of remuneration and as damages for wrongful dismissal. The main part of the claim was based on the contention that under his terms of service he was entitled to remain in the service of the trust during the whole of its life.

The defendants applied for particulars ". . . of the alleged "damage whether the plaintiff received any taxable income in any "of the tax years from 1948/1949 onwards, and if so, then (i) the "amount of such income from every source in each of such years; "(ii) the amount of any and all assessments to income tax and "surtax respectively in each of such years, showing how such "amounts are made up; and in any event giving full particulars "of any facts which entitled or would have entitled the plaintiff to "tax allowances in respect of each of the said years":—

Held, that inasmuch as since the decision in *British Transport Commission* v. *Gourley* [1956] A.C. 185; [1955] 3 All E.R. 796, the plaintiff's real claim for damages was not the gross amount he could show that he had lost, but the amount that he had lost on the footing that the remuneration he would have received but for his dismissal would have been liable to tax, the particulars sought were directly material to that question and, accordingly, the defendants were entitled to them.

Monk v. *Redwing Aircraft Co. Ltd.* [1942] 1 K.B. 182; 58 T.L.R. 94; [1942] 1 All E.R. 133 applied.

Per Jenkins L.J. Particulars should be limited to what is really reasonably necessary to enable the party seeking them to know what case he has to meet.

Decision of Glyn-Jones J. affirmed.

APPEAL from Glyn-Jones J.

The following facts are taken substantially from the judgment of Jenkins L.J.

This interlocutory appeal arose in an action brought by Ivon Morgan Phipps against Orthodox Unit Trusts Ltd. for damages for wrongful dismissal. The plaintiff was sole managing director of the defendant company, and his claim was in respect of a wrongful dismissal which took place on July 13, 1949. He claimed substantial sums in the shape of arrears of remuneration; and, as to damages for wrongful dismissal, he based the main part of his claim on the contention that the terms of service were such that he was entitled to remain in the service of the trust during the whole of its life. There was an alternative claim to the effect that, in any event, he must have been entitled to reasonable notice which he did not get, and he claimed one year's remuneration on that basis. There was also a matter of director's fees. His main remuneration appeared to have been a percentage, which was alleged to be 1 per cent., on sales of units by the defendant company. By their defence the defendants admitted that the plaintiff was wrongfully dismissed, but they averred that his percentage was not 1 per cent. but was one-third of 1 per cent.; and they contested his allegation that he was entitled to continue in the service of the company during the life of the trust.

The statement of claim gave certain particulars of damages in these terms: "9. The plaintiff will contend that had he remained "as sole managing director of the defendants for the full period "of the said trust the gross value of the sales of all units or "other interests in unit or other trusts of funds formed, managed "or sponsored by the defendants would, as far as can reasonably "be estimated, have been not less than an average of £1,000,000 "per annum after July 13, 1949, and would in all probability "have been considerably in excess of that average and that in "the premises the plaintiff's yearly remuneration after such date "would have been, on an average, not less than £10,000 until "the termination of the said trust, and would probably have "been considerably greater. The damage sustained by the "plaintiff is the loss of the said remuneration, together with the "loss of director's fees at the aforesaid rate."

On that pleading, there was a request for particulars in these terms: "Under paragraph 9. Of the alleged damage stating "whether the plaintiff received any taxable income in any of "the tax years from 1948/1949 onwards, and if so then (i) the "amount of such income from every source in each of such "years; (ii) the amount of any and all assessments to income "tax and surtax respectively in each of such years showing how "such amounts are made up; and in any event giving full "particulars of any facts which entitled or would have entitled "the plaintiff to tax allowances in respect of each of the said "years." The defendants' application for particulars in those terms was refused by the master, but on appeal Glyn-Jones J., at chambers, by an order dated July 31, 1957, reversed the master's decision and ordered that the particulars should be given.

The plaintiff appealed.

Graham Swanwick Q.C. and *Bernard Finlay* for the plaintiff. The particulars sought are objected to on three grounds: (1) Such information is not within the province of particulars at all. (2) It is not what the House of Lords in *British Transport Commission* v. *Gourley* [1] contemplated would happen. (3) It is objectionable in practice as duplicating discovery, augmenting the volume of pleading and adding considerably to the expense of litigation.

The purpose of a statement of claim is to inform the defendant of the nature of the plaintiff's case and the nature of his cause of action. That which is merely evidence on which to base an estimate of some uncertain factor in the case is not one of the facts which has to be pleaded as part of the pleadings: see R.S.C., Ord. 19, rr. 4 and 6. Discovery, on the other hand, is designed to elicit from the opposite party such evidence as he is obliged to disclose, much of which does not form the proper subject-matter of the statement of claim or particulars. A statement of claim is not defective because it does not contain, nor do particulars have to be given of, matters on which it is thought the defendants might wish to rely in mitigation of damages. It is conceded that a fact which is an *actual element* of special damage must be pleaded.

Monk v. *Redwing Aircraft Co. Ltd.* [2] is distinguishable. In that case information was sought of the precise sum earned by the plaintiff during other employment subsequent to his dismissal, which could easily be particularized. That was a fact which formed an element in the estimate of the special damage. Contra the present case, where the matters of which particulars are sought are merely circumstances which may or may not result in or facilitate the making of an estimate of the allowance which should be made for tax in the plaintiff's claim for damages. *Beach* v. *Reed Corrugated Cases Ltd.* [3] illustrates the difficulties which might arise if the information now sought had to be given by way of particulars.

[1] [1956] A.C. 185; [1955] 3 All E.R. 796.

[2] [1942] 1 K.B. 182; 58 T.L.R. 94; [1942] 1 All E.R. 133.

[3] [1956] 1 W.L.R. 807; [1956] 2 All E.R. 652.

The principle applicable to the present case to be deduced from *British Transport Commission* v. *Gourley*[4] is that the tribunal has to form a rough and ready estimate of the plaintiff's tax liability. It was never envisaged in *Gourley's* case[4] that the question of tax would be the subject of long and elaborate pleadings. Particulars are a cumbersome and expensive method of dealing with this matter. There is every reason to anticipate that on discovery the defendants will be able to extract from the relevant documents sufficient material on which to base an estimate for the purposes of the trial; if they cannot do so, they are entitled to further discovery, and if that is not sufficient, they are entitled to administer interrogatories. [Reference was also made to *The Telemachus*.[5]]

R. J. Parker for the defendants. (1) The purpose of pleadings is to make the opposing cases clear and to define the issue. (2) Discovery comes next, and is for the purpose of enabling the parties to look at material which may enable them to support their own case as it appears on the pleadings or to damage their opponents' case as it appears on the pleadings, or to discover some line of inquiry which may enable them to do either of those two things. (3) Damages for wrongful dismissal are special damage and nothing else, and therefore, as special damage, they are subject to being properly particularized.

The first proposition follows from the language of R.S.C., Ord. 19, r. 6. At the time the pleadings are closed the facts on which both parties rely should be set out therein, and it is only by reference to the pleadings that one decides whether or not a particular document ought to be discovered.

To contend that this matter can be dealt with by discovery is an attempt to make discovery do something it has never done before and which it was never designed by the Rules of the Supreme Court to do, and to substitute it for pleading and make the opponent guess and go to trial on his guess.

Since the decision in *Gourley's* case,[6] as applied in *Beach* v. *Reed Corrugated Cases Ltd.*,[7] the defendant to a claim for wrongful dismissal is now vitally concerned with the plaintiff's tax position. If the plaintiff's tax position is—as indeed it has been conceded—a matter which will affect the quantum of damages and will be an element in the determination of the amount of damages to be awarded, it follows that at least to a certain extent the tax facts must be pleaded, since it forms part of the plaintiff's case.

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[4] [1956] A.C. 185, 203, 208, 214.

[5] [1957] P. 47; [1957] 1 All E.R. 72.

[6] [1956] A.C. 185.

[7] [1956] 1 W.L.R. 807.

The importance of the present question is illustrated by the following example: suppose two men are engaged for a period of five years at a salary of £2,000 a year, and both are dismissed at the end of the first year. Neither of them can obtain other employment. In actions for damages for wrongful dismissal each claims four years' salary at £2,000 a year. One man has a wife and two children and no other source of income. The other is a bachelor with a private income of £10,000 a year. Unless particulars in a fairly detailed form are given, the defendants cannot know what elements in the case are going to be relied on.

Monk v. *Redwing Aircraft Co. Ltd.*,[8] it is submitted, covers the present case. The facts asked for by way of particulars in the present case are akin to those which it was held in the *Redwing* case[8] had to be given by way of particulars. The defendants are entitled to these particulars in order that they may know what the plaintiff's real claim for damages is. [Reference was also made to R.S.C., Ord. 31, r. 14; Ord. 19, rr. 12 and 14.]

Swanwick Q.C. in reply. It is not disputed that the defendants are entitled to ascertain the facts in relation to the plaintiff's tax position. But the plaintiff is being asked to supply evidence on which calculations can be based. Facts have to be pleaded but not evidence. Accordingly, that which is asked for in the present case is not the proper subject-matter of particulars but is to be adduced by way of discovery.

Jenkins L.J. stated the facts and continued: The question involved in the case is, to my mind, by no means free from difficulty. It is what one might describe as a by-product of the decision of the House of Lords in *British Transport Commission* v. *Gourley.*[1] Since that decision it has been established that where a claim is made for damages, whether for personal injuries or for wrongful dismissal, the income tax and surtax liability of the plaintiff is an essential element in the calculation of damages. The question in the present case is whether, that being so, the defendants are entitled to particulars in the form which I have read. In opposition to that view, Mr. Swanwick, for the plaintiff, says that the particulars here sought go beyond the proper function of particulars. He points out that under the Rules of the Supreme Court a pleading should contain, and contain only, a statement of the facts on which the party relies. He says that the particulars sought here are not facts material to the case; they are no more than facts from which a calculation might be made for the purpose of estimating the plaintiff's tax liability. He admits, and he could not well do otherwise, that matters such as those referred to in the particulars sought—that is to say, the amount of the plaintiff's income from every source during the years in question, the amount of all assessments and the question whether the plaintiff would have been entitled to any tax allowances—are all relevant to the quantum of damages and will have to be dealt with at some stage, but he says that they are not matters to be ascertained by way of particulars, because they are not facts material to the plaintiff's case and he therefore ought not to be compelled to introduce them into his statement of claim. Mr. Swanwick says that the proper course is to leave this matter to discovery, including (if the defendants are so advised) interrogatories.

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[8] [1942] 1 K.B. 182.

[1] [1956] A.C. 185; [1955] 3 All E.R. 796.

On the other side, much reliance is placed upon *Monk* v. *Redwing Aircraft Co. Ltd.*[2] It is said that this is a case in which special damages are being claimed and that it is the duty of a plaintiff claiming special damage to give full particulars showing what is the amount of the damage which he claims. *Monk* v. *Redwing Aircraft Co. Ltd.*[2] certainly provides a clear authority for that proposition. I will refer to the headnote: "In an action for wrongful dismissal where the contract of service did not state the length of notice required to terminate it, the defendants applied before defence for particulars of (1) the period of time claimed by the plaintiff to constitute a reasonable notice, and (2) the special damage alleged, stating whether during the period alleged to constitute reasonable notice 'he obtained other employment or employments and if so (a) when, (b) with whom, (c) date of commencement, (d) salary and terms of employment, (e) the nature thereof, and (f) whether any such employment is still continuing and, if not, when it determined.'" Lord Greene M.R. said[3]: "The plaintiff's salary in the employment from which he has been dismissed is really one element in ascertaining what the just measure of damage is, and another element is the salary which he earned in another employment, but what is claimed is damages and not, so to speak, the balance of an account. It is, therefore, misleading to use such phrases as 'give credit

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[2] [1942] 1 K.B. 182; 58 T.L.R. 94; [1942] 1 All E.R. 133.

[3] [1942] 1 K.B. 182, 186.

" 'for' and 'bring into account,' although there is no particular "harm in them if it is realized that they are not used in a strict "sense. What, then, is the position of a plaintiff who claims "damages in a case such as this? It seems to me that he must "specify what it is that he claims, and in every statement of "what he claims by way of special damages there is necessarily "implicit one of two allegations, either that he has not earned "any remuneration in other employment during the relevant "period, or that he has done so, and any form of pleading or "any particulars given which do not bring to the clear knowledge "of the defendant which of those two implicit statements he is "going to rely on is, in my judgment, embarrassing." A little further on he continued: "As I have said, I am unable to "ascertain whether the plaintiff is saying: 'I earned nothing,' or " 'I earned something which I do not specify.' In those circum"stances the defendants ask for particulars." Then Lord Greene set out the particulars, and went on: "Having regard to the "form of the pleading in this case, it seems to me that the "defendants are entitled to particulars substantially in that form "to enable them to know what the plaintiff's real claim for "damages is." Then Lord Greene went on to discuss the bearing upon these particulars of the possible case of a payment into court.

Mr. Parker, strongly relying on that case, says that in the present case too it is necessary that the defendants should have the particulars sought in order that they may know what the plaintiff's real claim for damages is. Mr. Swanwick seeks to displace the *Redwing* case [4] by saying that the sum of which particulars were ordered in the *Redwing* case [4] was a real sum entering directly into the calculation of the plaintiff's loss of earnings. In contrast to that, he says that the matters of which particulars are here sought are merely circumstances which may or may not result in or facilitate the making of an estimate of the allowance which should be made for tax in the plaintiff's claim for damages. He says this case is distinguishable from the *Redwing* case [4] on that ground. I do not think that distinction is valid. The essential thing is that the pleading should suffice to tell the defendants what the plaintiff's real claim for damages is. Since *Gourley's* case,[5] the plaintiff's real claim for damages is not the gross amount he can show that he has lost but the amount that he has lost on the footing that the remuneration he would have received but for his dismissal would have been liable to tax. It

[4] [1942] 1 K.B. 182.

[5] [1956] A.C. 185.

seems to me that the particulars sought are directly material from that point of view. They have a direct bearing on the amount of tax which it would be proper to bring into calculation. Nor do the particulars relate to any purely hypothetical state of affairs. They are asked for in respect of the period from the year of wrongful dismissal onwards, and they are actual figures relating to that period. One may say that the plaintiff himself introduced in his particulars, which I have read, a hypothetical calculation which supported the allegation that his yearly remuneration during the period in question or after such date—that is, the date of wrongful dismissal—" would have been, on " an average, not less than £10,000 until the termination of the " said trust." That figure not having allowed for tax, what the defendants say is: " That may be your gross remuneration year " by year, but, as against that, we must set your tax liability " year by year, and that will form the basis for an estimate of " your real claim for damages." Accordingly, I regard this case as in substance covered by the *Redwing* case,[6] and I agree with Mr. Parker's submission that discovery and interrogatories would in this case be no substitute for particulars, inasmuch as unless and until the particulars sought are given, it will not be possible for the defendants to know what case they have to meet.

Accordingly, I think that this appeal fails and should be dismissed. I arrive at that conclusion without any satisfaction, for it seems to me that it is a conclusion which, unless applied with caution and common sense, may well result in a great waste of time and expense. If in every one of these cases elaborate particulars are to be sought of the plaintiff's tax position, the costs of litigation in a wide area of cases will be greatly increased; but, after giving the matter the best consideration I can, it does not seem to me that any other conclusion is open. I trust that the matter will be kept in check by the masters and judges applying the principle that particulars should be limited to what is really reasonably necessary to enable the party seeking them to know what case he has to meet. But the result of this case is that the appeal should be dismissed.

PARKER L.J. I agree. The damages claimed in this case are damages for wrongful dismissal and as such are clearly special damage, particulars of which must be given. The claim as put forward in the statement of claim particularized those damages in this way: " The damage sustained by the plaintiff is the loss

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[6] [1942] 1 K.B. 182.

"of the said remuneration." Clearly that, even before *Gourley's* case,[7] was a defective plea, because it did not state whether the plaintiff had during the period of the claim entered into any other, and if so what, employment. That particular matter was cured by particulars; but it is said that, even then, as cured, it is still defective having regard to the decision in *Gourley's* case.[7] For my part, I am satisfied, and I think Mr. Swanwick is forced to agree, that at any rate the plaintiff must make an estimate of the amount of tax which he would have had to pay if he had remained in employment and subtract that from the gross remuneration in order to show the real loss claimed.

I therefore approach the matter in this way: assuming that the estimate had been made, could the defendants have come forward and asked for further particulars? I confess, somewhat reluctantly, I have come to the conclusion that a defendant is entitled to particulars, not necessarily a calculation but the facts relied upon by the plaintiff in arriving at that estimate.

I would only add one word of caution, following what my Lord has said. I think it would be unfortunate if the decision of this court should give rise to application after application for detailed particulars to be given in every case. In my judgment, particulars should generally be confined to the broad facts, such as "The plaintiff is a married man," "He is entitled to an "allowance in respect of two children," "His unearned income "is £100 a year," matters of that sort, and in the ordinary case that can give rise to no difficulties. It is only in a case such as the present, where considerable labour, no doubt, is put upon the plaintiff and his advisers in order to give proper particulars. But if the particulars in the ordinary run of cases are the broad facts which I have indicated, and if they are limited, as they must be, to special damage in cases of tort, I cannot see that any difficulties should arise. I would dismiss this appeal.

Pearce L.J. I agree entirely with what my Lords have said.

Appeal dismissed.
Leave to appeal to the House of Lords refused.

Solicitors: *Alfred Neale & Co.; Linklaters & Paines.*

J. A. G.

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[7] [1956] A.C. 185.

JOHN FAIRFAX & SONS PTY. LTD. *v.* E. C. DE WITT & CO. (AUSTRALIA) PTY. LTD.

C. A.

1957
Oct. 18.

Jenkins, Parker and Pearce L.JJ.

[1955 J. 2279.]

Practice and Procedure—Interpleader proceedings—Costs—Order that two actions be listed and tried together—Whether jurisdiction to order unsuccessful plaintiff in one action to pay defendant in that action costs of different proceeding to which plaintiff was not party—R.S.C., Ord. 65, *r.* 1.

Costs—Discretion of court—Ambit of court's discretion—Interpleader proceedings—R.S.C., Ord. 65, *r.* 1.

The ambit of the discretion in respect of the award of costs conferred upon the court by R.S.C., Ord. 65, r. 1,[1] is that the court has a discretion to order the costs of and incident to all proceedings to be paid by the parties to *those* proceedings, or any of them, as the court in its discretion thinks right. But in the absence of an order for consolidation the court has no jurisdiction under the Rules of the Supreme Court to order the unsuccessful plaintiff in the first of two actions listed and tried together to pay to the defendant in that action the costs which that defendant has to pay to the successful plaintiff in the second of the two actions, to which the plaintiff in the first action was not a party.

In interpleader proceedings, an order was made by consent that the action in which the interpleader summons was issued, the parties to which were E. Ltd. and D. Ltd., should be listed and tried together with another action, the parties to which were F. Ltd. and D. Ltd. At the trial, F. Ltd.'s action against D. Ltd. failed, but E. Ltd.'s action against D. Ltd. succeeded. Both actions arose out of the making of certain advertising agreements.

On an appeal against the judge's refusal, on the grounds of want of jurisdiction, to make an order that F. Ltd. pay D. Ltd.'s costs of the action brought by E. Ltd. against D. Ltd.:—

Held, that in the absence of an order for consolidation the court had no jurisdiction to make the order sought.

Observations of Collins L.J. in *Forbes-Smith* v. *Forbes-Smith and Chadwick* [1901] P. 258, 269, 271; 17 T.L.R. 587 applied.

Per Parker L.J. In cases where consolidation is not possible, it is not only convenient that such an order should be made, but in the interests of justice it may be that the court should have power to deal with all the costs of the proceedings tried together; but under the rules as at present constituted that cannot be done.

Decision of Gorman J. affirmed.

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[1] R.S.C., Ord. 65, r. 1: "Subject "to the provisions of the Act and "these Rules, the costs of and "incident to all proceedings in the "Supreme Court, including the ad"ministration of estates and trusts, "shall be in the discretion of the "Court or Judge. . . ."

C. A.

1957

John Fairfax & Sons Pty. Ltd.
v.
E. C. de Witt & Co. (Australia) Pty. Ltd.

Appeal from Gorman J.

This was an appeal, with leave of the judge, from an order of Gorman J. dated February 15, 1957, so far only as related to the question of the payment of certain costs arising out of two actions which were ordered to be listed and tried together.

The relevant facts are taken from the judgment of Jenkins L.J.

The three parties concerned were E. C. de Witt & Co. (Australia) Pty. Ltd., an Australian company with an office in London, which was a subsidiary of an American company, and the business of which consisted of marketing various proprietary preparations with which the American company dealt all over the world. This company was referred to in the case as "De Witts." Secondly, John Fairfax & Sons Proprietary Ltd. (referred to in the case as "Fairfax") a company registered in Sydney, New South Wales, but with an office in London, who were the proprietors of two newspapers, the "Sydney Morning Herald" and the "Sunday Herald." Thirdly, an English company, W. H. Emmett (Overseas) Ltd. (referred to in the case as "Emmetts"), which had taken over the overseas business of an earlier company, and which carried on the business of advertising practitioners.

De Witts wished to secure publicity for their goods in the Australian papers. They became clients of Emmetts, the advertising practitioners, who engaged for reward to see that these goods were suitably represented in the appropriate advertising media of which by far the most important was newspaper advertisement. There was no doubt that Emmetts placed a large amount of advertising in respect of De Witts' goods with a large number of different newspapers: the total came to something like 130 different newspapers or newspaper proprietors. Unfortunately, Emmetts fell into financial difficulties and the result was that the newspapers were not paid for the space which Emmetts had bespoken. On November 19, 1953, Emmetts went into a creditors' voluntary winding up. It appeared, therefore, that if Emmetts were responsible for the amount expended on advertising, the newspapers probably would not get anything approaching the full amount due to them. It was, therefore, important for the newspapers to establish, if they could, a direct claim against De Witts. On the other hand, it was, no doubt, the duty of the liquidator of Emmetts to get in all the money to which that company might be entitled in respect of these advertising transactions.

The litigation began on April 15, 1954, when Emmetts issued a writ against De Witts claiming the amount of the expenses Emmetts had incurred on advertising in the Australian press. A number of other claims emerged and the real contest which arose was on the question whether Emmetts, in doing this advertising work, were acting as principals to whom the newspaper proprietors could look for payment, or on the other hand, were acting as agents for De Witts so that the newspaper proprietors could establish a direct claim against De Witts. In the result other litigation was launched. Fairfax issued a summons on May 6, 1954, in the Metropolitan District Court of New South Wales claiming a sum of £360 15s., which was the amount due to Fairfax in respect of some of this advertising. That was a small proportion of the total in issue. If one counted in all the transactions with all the newspapers, the total amount involved was upwards of £14,000.

In those circumstances De Witts might be said to have been between two fires, and accordingly on June 22, 1954, they issued an interpleader summons in the Emmett action, and in that summons a formidable total of over 100 newspapers were joined. It became obvious to the legal advisers of the various parties concerned that it would hardly be practicable to deal with these interpleader proceedings in the ordinary way, in view of the very large number of people concerned. Accordingly, after some negotiations an order was made by consent on June 17, 1955, on the interpleader summons in Emmetts' action. That consent order, so far as relevant, was in these terms: "1. Proceedings "will be brought in England against De Witt by representative "claimants represented by Messrs. Bell, Brodrick & Gray and "Messrs. Pothecary & Barratt, including at least one claimant "who is a member of the Australian Newspaper Proprietors "Association and/or the Australian Newspapers Advertising "Control Board and at least one claimant who has proved in "the liquidation of Messrs. Emmett & Co. Ltd." Then there was a provision about the acceptance of service and a provision that De Witts would not ask for security for costs. Then there was this provision: "4. The said proceedings will be ordered to "be listed and tried together with the existing action Emmett "against De Witt. 5. All claimants will accept the decision in "the proceedings as conclusive of the rights and liabilities in "their cases, also De Witts similarly will accept the decision as "conclusive. Rights of appeal, however, to be open to all "parties. 6. The pending proceedings in Australia by Fairfax

" Proprietary Co. Ltd., against De Witt will be stayed indefinitely " the costs thereof being borne by the plaintiff or the defendant " therein in accordance with the result of the proceedings. It is " ordered :—(*a*) that the interpleader summons be adjourned *sine* " *die* subject, however, to the following (*b*) that the costs of the " interpleader proceedings be reserved to the judge who tries the " actions. (*c*) That De Witts have liberty to apply for an order " barring claims by any claimants who have been served but have " not appeared. (*d*) Liberty to all parties to apply to restore the " summons in the event of any failure to carry out any of the " terms of the above agreement."

In pursuance, though, it would seem, in anticipation of the actual completion, of the consent order, Fairfax issued a writ against De Witts on May 2, 1955, their claim being framed on the basis that Emmetts were agents for De Witts. That action, and one other, were the only actions started in pursuance of the arrangements stated in the consent order. The other was an action by " Truth & Sportsman " which, however, was in the end discontinued.

In due course the actions came before the judge and he decided that Emmetts were acting, as he expressed it, " as " principal both ways," that is to say, they were not agents of De Witts, and when they placed advertising with a newspaper, the newspaper could look to them, and to them only, for payment. On that it necessarily followed that Fairfax's action against De Witts failed, so that the appropriate order prima facie was, as regards that action: " action dismissed with costs." On the other hand, Emmett succeeded against De Witts so that the order there would be prima facie: " Judgment for Emmetts against " De Witts with costs."

Stephen Chapman Q.C. and *M. J. Turner* (*John Stephenson* with them) for the defendants. The proper order to make in the circumstances of this case is that Fairfax's action against De Witts should be dismissed with costs and an order should be made on Fairfax to pay De Witts' costs of the Emmett action. Gorman J. held that he had no jurisdiction to make such an order, but it is submitted the court has such jurisdiction under R.S.C., Ord. 65, r. 1, the language of which is couched in the widest terms. The judge placed far too narrow a construction on the words of the rule. Where an order is made in interpleader proceedings that two actions are to be listed and tried together, they are turned into a composite set of proceedings for the purposes of this rule. It is to be noted that the rule refers to *proceedings*, not actions. The order sought is analogous to a Bullock Order, which is frequently made between co-defendants or between a defendant and a third party where one or other of the parties concerned has been substantially responsible for the litigation.

This appeal raises a novel question—there is no authority directly in point. The observations of Collins L.J. in *Forbes-Smith* v. *Forbes-Smith and Chadwick* [2] on the meaning of "proceedings" are distinguishable, for they turn entirely on the provisions of section 34 of the Matrimonial Causes Act, 1857. In the present case the order in the interpleader proceedings achieved, in substance, the same result as if there had been an order for consolidation, for the effect of the order when acted on was to constitute a trial before the judge of a single set of proceedings. [Reference was also made to *Norton* v. *Norton* [3]; *Bailey* v. *Curzon of Kedleston (Marchioness)* [4]; *Boguslawski* v. *Gdynia Ameryka Linie (No. 2)*.[5]]

R. W. Goff Q.C. and *H. J. Astell Burt* for the plaintiffs. To suggest that "proceedings" in R.S.C., Ord. 65, r. 1, means composite proceedings is a fallacy. "Proceedings" there means proceedings properly brought before the court in the prescribed manner: see R.S.C., Ord. 1, rr. 1 and 2. The analogy of third party proceedings does not assist, because they are specifically provided for by the rules. Further, in third party proceedings an indemnity is usually claimed.

Reliance is placed on the following propositions as a complete answer to the defendants' argument: (1) The parties in the present case were not in a position to consolidate because of a direct conflict of interest between the respective plaintiffs. (2) Even if the parties could have consolidated the actions, they did not in fact do so. (3) Trying actions together is not consolidation and does not make the proceedings all one for the purposes of R.S.C., Ord. 65, r. 1. Reliance is placed on the observations of Collins L.J. in *Forbes-Smith* v. *Forbes-Smith and Chadwick* [6] and of Somervell L.J. in the *Boguslawski* case.[7] (4) If the actions did not become all one, then the court had no jurisdiction to make the order sought, and Gorman J. so decided correctly [Reference was also made to R.S.C., Ord. 36, r. 40.]

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[2] [1901] P. 258, 269; 17 T.L.R. 587.

[3] [1945] P. 56; 61 T.L.R. 451; [1945] 2 All E.R. 122.

[4] [1932] 2 K.B. 392; 48 T.L.R. 283.

[5] [1951] 2 K.B. 328; [1951] 2 All E.R. 113.

[6] [1901] P. 258, 269, 271.

[7] [1951] 2 K.B. 328, 333.

Chapman Q.C. in reply. It is not disputed that the reference to "proceedings" in R.S.C., Ord. 65, r. 1, means proceedings completely constituted under R.S.C., Ord. 1, r. 1. The sole question at issue is whether the form of order in question does or does not produce some unification of actions, albeit separate actions, so as to constitute a composite set of proceedings for the purposes of R.S.C., Ord. 65, r. 1. The actions on being ordered to be tried together do form a composite set of "proceedings" within Ord. 65, r. 1. This question has not been precluded by anything which the courts have decided hitherto.

Somervell L.J. in the *Boguslawski* case [7] did not say that, short of consolidation, there could not be any unification of actions; he merely said that such a concept was a difficult one—a statement which is not controverted by the defendants.

JENKINS L.J. stated the facts and continued: The point of the appeal is a very short one. Mr. Chapman, who appeared for De Witts, claimed that the proper order to be made was that Fairfax's action against De Witts should be dismissed with costs, but that over and above that an order should be made on Fairfax, as I understand it, to pay De Witts' costs of the Emmett action. The judge held that he had no jurisdiction to make such an order. The order sought was analogous to what is known as a Bullock Order, which is frequently made between co-defendants or between a defendant and a third party where one or other of the parties concerned has been substantially responsible for the litigation. But those orders are confined to orders for costs made as between the parties to the proceedings. The question we have now to decide is whether the judge was right in holding, as he did, that there was no jurisdiction to make such an order in a case like the present one where there are in origin two actions and these actions are not consolidated, but are, by consent, listed so that they will come on together. Mr. Chapman says that the court has such jurisdiction and he relies on the very wide words of R.S.C., Ord. 65, r. 1, which provides: "Subject to the provisions of the Act and these Rules, the costs of and incident to "all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court "or Judge." Mr. Chapman says that on the language of that rule, it was perfectly open to the judge in the present case to deal as he might, in his discretion, think fit with the costs of Emmetts' action against De Witts, which in Mr. Chapman's submission ought to have been ordered to be paid to De Witts by Fairfax.

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[7] [1951] 2 K.B. 328.

After paying the best attention I can to Mr. Chapman's argument, I find myself unable to accept it. "All proceedings" means all proceedings, I suppose, commenced in any manner authorized by the Rules of the Supreme Court. It is with respect to proceedings in that sense that the judge is given an absolute discretion as to costs. But what does that mean? When the rule says that costs are to be in the discretion of the court or judge, it cannot mean that the court or judge can direct the costs in question to be paid by any person the judge may choose, whether he is a party to the proceedings or not. Some limit must be placed on the language and I should have thought it reasonably plain that the limit is this: that the court has a discretion to order the costs of and incident to all proceedings to be paid by the parties to those proceedings, or any of them, as the court in its discretion thinks right. If that be so, it seems to me there must be an end of Mr. Chapman's argument, for what he claims there is jurisdiction in the court to do, is to direct that the unsuccessful plaintiff in one action shall pay the defendant in that action the costs of a different proceeding to which that plaintiff was not a party. That, as I understand it, would be the result of holding that there is a discretion of the kind contended for by Mr. Chapman in this case. I do not think that can be right, and I found myself on the language of the rule and on the reasons I have attempted briefly to express.

We were not referred to any authority precisely in point, but I think the conclusion which seems to me to be right is perhaps borne out by some of the observations made in *Forbes-Smith* v. *Forbes-Smith and Chadwick*.[1] The headnote reads: "A wife "having filed a petition for judicial separation, on the grounds "of her husband's cruelty, the husband afterwards filed a petition "for dissolution of the marriage. An order was made for the "consolidation of the two suits, and they came on for trial "together. The wife's charge against the husband was with-"drawn, there being no evidence in support of it; and her petition "was dismissed. On the husband's petition a decree nisi was "made for dissolution of the marriage, with costs and damages "against the co-respondent, and the decree was afterwards made "absolute: *Held*, that the consolidation order had not the effect

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[1] [1901] P. 258; 17 T.L.R. 587.

"of making the proceedings on the wife's petition part of the "proceedings on the husband's petition, and that consequently "there was no jurisdiction under section 34 of the Matrimonial "Causes Act, 1857, to order the co-respondent to the husband's "petition to pay the costs of the proceedings on the wife's "petition." The decision of Jeune P. was reversed.

That is, of course, a very different case and it must be borne in mind that it turned to a great extent on a particular provision of the Matrimonial Causes Act, 1857. But these observations of Collins L.J. seem to me to have some bearing on the question in this case. He said [2]: "This then being an appeal against a final "order, the question next arises whether the decision was right. "The parties have consented that the appeal shall be heard by "two judges. Can the order be maintained? The question turns "upon section 34 of the Matrimonial Causes Act, 1857. The "power to order a co-respondent to pay costs is a statutory one; "the court has no inherent power to visit with costs a co-"respondent who is not in the strictest sense of the word a "'party' to the proceedings. He is introduced into the suit by "virtue of the provisions of the statute. It seems to me that the "learned President was quite right in holding that the power "given by section 34 is limited to persons who are parties to 'the "'proceedings.' And I think 'the proceedings' must mean the "proceedings in a suit to which the co-respondent is a party, i.e., "the proceedings upon 'a petition presented by a husband.' The "section gives no power of itself to visit with costs any person "who is not a party to the proceedings." Then, again, he said [3]: "We cannot visit him with the costs of proceedings to which he "was not a party. The jurisdiction arises only if the proceedings "of the wife's petition have become part of the proceedings on "the husband's petition, and I do not think that is the result of "the order for consolidation. In my opinion there has been "nothing analogous to consolidation at common law. The prac-"tice of trying at the same time petitions by a husband and a "wife has been adopted merely for convenience, and does not "operate to consolidate the two suits in the sense of constituting "one suit out of the two."

In the present case, as has appeared from what I have already said, there was no consolidation. The difficulties in the way of consolidation were obvious in that the two actions were actions in which the interests of the respective plaintiffs were diametrically

[2] [1901] P. 258, 269.

[3] Ibid. 271.

opposed. But assuming that, in theory, consolidation would have been practicable, there was none. These two actions, still bearing their original character as separate and distinct actions, were for convenience listed and heard together; but that does not make them anything else than two actions, and I think the judge's discretion as to the costs of either action must be confined to the parties to that action. For the reasons I have endeavoured to express, I think the judge came to a right conclusion in holding that he had no jurisdiction to make the order sought.

I would add, that while the view I have taken on the question of jurisdiction renders it unnecessary to go into the merits, which were not argued before us, it does seem to me that it is not, by any means, a foregone conclusion that the order which Mr. Chapman says should have been made ought, upon the merits of the case, to have been made in all the circumstances. For those reasons I would dismiss this appeal.

Parker L.J. I agree. Under R.S.C., Ord. 65, r. 1, the costs of and incident to all proceedings in the Supreme Court shall be in the discretion of the court or judge. "Proceedings" there must, I think, mean proceedings properly brought before the court in the prescribed manner (see R.S.C., Ord. 1, rr. 1 and 2). It is also, I think, clear that A cannot be ordered to pay the costs of B incurred in proceedings to which A was not a party. Accordingly, to succeed, Mr. Chapman must show in the present case that John Fairfax & Sons Pty. Ltd. were parties to the same proceedings as Emmetts and De Witts. He seeks to do that by reference to the order that was made in the interpleader proceedings that these two actions—and indeed a third—were to be listed and tried together. For my part I am satisfied that that order does not have the effect of turning separate proceedings into one set of proceedings. In my view, nothing short of consolidation can do that under the existing rules, and in this case not only was there no order for consolidation, but on the facts it is clear that consolidation was impracticable.

The truth of the matter is that this order, which is not an uncommon order to make, is eminently one of convenience in that it enables all the evidence to be called at once before the court. But it does not, under the rules as at present constituted, enable the judge at the trial of the proceedings listed and tried together to make what I may call a global order in regard to costs. I confess that in cases where consolidation is not possible, it is not only convenient that this order should be made, but in the

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JOHN FAIRFAX & SONS PTY. LTD. *v.* E. C. DE WITT & CO. (AUSTRALIA) PTY. LTD.

interests of justice it may be that the court should have power to deal with all the costs of the proceedings tried together. But under the rules, I am quite satisfied that that cannot be done at present.

For those reasons I would dismiss this appeal.

PEARCE L.J. I agree.

Appeal dismissed.

Solicitors: *Henry Pumfrey & Son; Bell, Brodrick & Gray.*

J. A. G.

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June 25, 26; *July* 5.

Morris and Pearce L.JJ.

KANDA AND ANOTHER *v.* CHURCH COMMISSIONERS FOR ENGLAND.

[1957 C. 329.]

Landlord and Tenant—Repairs—Act of 1938*—Proceedings for forfeiture for breach of covenant—Notice of breach served on tenant—Counter-notice by tenant claiming benefit of Leasehold Property (Repairs) Act,* 1938*—Leave obtained to proceed against tenant—Assignment of lease—No notice of breach served on assignee—No leave of court to proceed against assignee—Proceedings against assignee—Whether obligation to notify assignee and to obtain leave to proceed against him—" Lessee "—Law of Property Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 146*—Leasehold Property (Repairs) Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 34), *s.* 1.

In February, 1956, the landlords of premises, let on a term of which more than three years remained unexpired, served on the tenant a notice under section 146 of the Law of Property Act, 1925,[1] alleging that there had been breaches of a covenant in the

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[1] Law of Property Act, 1925, s. 146: " (1) A right of re-entry or " forfeiture under any proviso or " stipulation in a lease for a breach " of any covenant or condition in the " lease shall not be enforceable, by " action or otherwise, unless and until " the lessor serves on the lessee a " notice—(*a*) specifying the particular " breach complained of; and (*b*) if " the breach is capable of remedy, " requiring the lessee to remedy the " breach; and (*c*) in any case, requir- " ing the lessee to make compensation " in money for the breach; and the " lessee fails, within a reasonable " time thereafter, to remedy the " breach, if it is capable of remedy, " and to make reasonable compen- " sation in money, to the satisfaction " of the lessor, for the breach. (2) " Where a lessor is proceeding, by " action or otherwise, to enforce such " a right of re-entry or forfeiture, the " lessee may, in the lessor's action, " if any, or in any action brought by " himself, apply to the court for relief; " and the court may grant or refuse

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lease to keep the property in repair, specifying the breaches complained of and requiring the tenant to remedy them within two months. The tenant served a counter-notice claiming the benefit of the Leasehold Property (Repairs) Act, 1938.[2]

In January, 1957, leave to begin proceedings against the tenant was obtained. At or about the same date the tenant assigned his interest to B. The landlords were aware of the assignment, though

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relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, . . . as the court, in the circumstances of each case, thinks fit. (3) A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages (if any), all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor, or from which the lessee is relieved, under the provisions of this Act. . . . (5) For the purposes of this section— . . . (*b*) 'lessee' includes an original or derivative under-lessee, and the persons deriving title under a lessee; also a grantee under any such grant as aforesaid and the persons deriving title under him."

S. 196: "(2) Any notice required or authorized by this Act to be served on a lessee or mortgagor shall be sufficient, although only addressed to the lessee or mortgagor by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained."

[2] Leasehold Property (Repairs) Act, 1938, s. 1 (as amended by the Landlord and Tenant Act, 1954, s. 51 (2)): "(1) Where a lessor serves on a lessee under subsection (1) of section 146 of the Law of Property Act, 1925, a notice that relates to a breach of a covenant . . . in repair . . . and at the date of the service of the notice three years or more of the term of the lease remain unexpired, the lessee may within 28 days from that date serve on the lessor a counter-notice to the effect that he claims the benefit of this Act. . . . (2) A right to damages for a breach of such a covenant as aforesaid shall not be enforceable by action commenced at any time at which three years or more of the term of the lease remain unexpired unless the lessor has served on the lessee not less than one month before the commencement of the action such a notice as is specified in subsection (1) of section 146 of the Law of Property Act, 1925, and where a notice is served under this subsection, the lessee may, within 28 days from the date of the service thereof, serve on the lessor a counter-notice to the effect that he claims the benefit of this Act. (3) Where a counter-notice is served by a lessee under this section, then, notwithstanding anything in any enactment or rule of law, no proceedings, by action or otherwise, shall be taken by the lessor for the enforcement of any right of re-entry or forfeiture under any proviso or stipulation in the lease for breach of the covenant or agreement in question, or for damages for breach thereof, otherwise than with the leave of the court. (5) Leave for the purposes of this section shall not be given unless the lessor proves . . . (etc.). (6) The court may, in granting or in refusing leave for the purposes of this section, impose such terms and conditions on the lessor or on the lessee as it may think fit."

their consent was not sought nor required. Proceedings were brought against the tenant, the assignee B. being joined as a defendant by leave of the master obtained ex parte. No application for leave to proceed against B. was made nor was any notice pursuant to section 146 of the Law of Property Act, 1925, served on him. He was served with the writ but failed to enter an appearance and judgment was obtained against him in default of appearance. He then applied to have the judgment set aside. The master made the order asked for, but the judge set it aside and B. appealed:—

Held, (1) that the requirement of section 146 of the Act of 1925 had been sufficiently complied with by notifying the person who was "the lessee" at the time when the notice was served, and that no further notice had to be given to the assignee B.;

(2) that leave of the court was, however, required before proceedings could be brought against the assignee. Leave had only been obtained to proceed against the tenant and, accordingly, the judgment obtained against the assignee was irregular and should be set aside.

Decision of Barry J. reversed.

Appeal from Barry J. in chambers.

The following statement of the facts is taken from the judgment of Morris L.J.

By a lease dated June 10, 1868, the Church Commissioners for England as owners of the freehold reversion of premises known as 21, Shirland Road, Paddington, granted to one Kellond a term of 97¾ years from March 25, 1868, at a rent of £9 per annum. The lessee covenanted to keep the property in repair and to do certain work of decoration. The lease contained a proviso for re-entry in the event of default being made in the performance of the covenants. At some unascertained date prior to January, 1956, the term of years granted by the lease became vested in S. Kanda as assignee.

In January, 1956, the Church Commissioners (hereinafter called "the landlords") alleged that the premises were then out of repair in such a manner as to constitute a breach of covenant. A schedule of wants of repair was served upon Kanda, hereinafter called "the tenant," on February 2, 1956. On the same date a notice under section 146 of the Law of Property Act, 1925,[1] was served upon the tenant by the agents of the landlords. The notice was addressed "S. Kanda, 21, "Shirland Road, London, W.9, or other the person, persons or "company the lessee or lessees for the time being of the premises "known as 21, Shirland Road, Paddington, London (hereinafter "referred to as 'the said premises') and to all other persons

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[1] Ante 332.

"whom it may concern." The notice recited that there had been and were breaches of the covenants contained in the lease, that the particular breaches complained of were comprised in the particulars specified in the schedule of wants of repairs which was annexed: it required the breaches of covenant to be remedied, and the works of repair and amendment to be carried out in accordance with the schedule. The notice further contained the following words: "The lessee is entitled under the "Leasehold Property (Repairs) Act, 1938,[2] as amended, to serve "upon the commissioners a counter-notice claiming the benefit "of the said Act. Such notice may be served upon the said "commissioners at the office mentioned below at any time "within 28 days from the date of service hereof." At the same time the agents to the landlords wrote a letter to the tenant in the following terms: "We enclose a statutory notice "under section 146 of the Law of Property Act, 1925, and "we would be obliged if you would return the duplicate notice "duly receipted. We are prepared to advise the Church Com-"missioners to allow two months as a reasonable time for "compliance with the schedule. Failing compliance with this "schedule within the time mentioned, which will expire on "April 2, 1956, we shall have no course but to advise the Church "Commissioners to take the necessary proceedings." The tenant wrote back claiming that such a repair could not be done during the winter and claiming the benefit of the Leasehold Property (Repairs) Act, 1938.

In spite of the intimation contained in the letter from the agents in reference to the period of two months which would expire on April 2, 1956, no work of repair was done by the tenant and no action was taken by the landlords. Towards the end of the year, however, steps were taken to obtain the leave of the court to take proceedings. On December 4, 1956, an affidavit was sworn by a certain building surveyor employed by the firm of chartered surveyors and valuers acting as the agents for the landlords. The surveyor deposed that he had made an inspection of the premises on January 25, 1956, and the schedule of wants of repair had been prepared by him so as to set out the repairs which he considered should be carried out in order to comply with the covenants in the lease. He estimated that the cost of carrying out the required repairs would exceed £500 and he was of opinion that the value of the reversion to the lease had been substantially diminished by the wants of repair and that the immediate remedying of the wants of repair was requisite for preventing further substantial diminution in the value of the reversion. He further stated that he had inspected the premises on November 21, 1956, and that none of the wants of repair set out in the schedule had been remedied.

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[2] Ante 333.

On January 14, 1957, an application by way of originating summons was made by the landlords to Pearce J. as judge in chambers, for leave to commence proceedings against the tenant. An order was made "that the landlords should have leave to "start proceedings against S. Kanda (male) to enforce their "right of re-entry and to damages for breaches of covenant to "repair premises known as No. 21, Shirland Road, Paddington, "in the County of London, contained in a lease dated June 10, "1868, and that the applicant do have the benefit of section 146 "(3) of the Law of Property Act, 1925. . . ."

At that date, however, the tenant was in the course of disposing of his interest in the property. In a letter dated January 11, 1957, from the landlords' solicitors to the solicitors for the tenant, it was said that the writers had been informed that the tenant was in the course of disposing of his interest in the property and that completion had been fixed for January 14. Attention was called to the fact that proceedings were pending against the tenant with a view to obtaining forfeiture of the lease, and the tenant's solicitors informed the solicitors to the landlords that notwithstanding the position the purchaser wished to proceed and would probably have the necessary works done to the property as quickly as possible. The tenant assigned the lease to Austin St. Clair Bridgwater (hereinafer called "the "assignee") for the sum of £300. No permission to assign was in this case necessary. The deed of transfer was executed on or about January 14 or 15, 1957.

Pursuant to the leave granted by the order of January 14 a writ was issued on January 28, 1957, against the tenant "S. Kanda (male)," claiming possession of the premises, damages for breach of covenant, and sums by way of rent and mesne profits.

On February 27, 1957, formal leave to amend by joining the assignee was obtained from Master Grundy, but there was no application to the judge for leave pursuant to the Act of 1938. By the amended statement of claim on the writ the claim for possession as against the tenant was dropped and possession was claimed against the assignee together with damages for breach of covenant, and together with certain claims for rent and mesne profits. The amended writ was served on the assignee on March 14. He failed to enter an appearance and on March 27 the landlords obtained judgment in default of appearance. It was adjudged that the landlords recover possession of the premises, a sum of 7s. 6d. as arrears of rent, a sum of £1 8s. 7d. by way of mesne profits from January 28, further mesne profits from the date of judgment to the date of possession and damages for breach of covenant to be assessed.

The assignee then applied to have the judgment set aside, supporting his application by an affidavit sworn on April 4, in which he gave his reasons for not appearing. He said that he had been in the United Kingdom only two years, that he was an engineering student, aged 21 years, from the West Indies, and that he did not completely understand the legal position arising as a result of the writ. He admitted that when he took the assignment he had been handed a document which was a list of the repairs which were required to be carried out to the premises; and claimed that a builder had advised him that the cost of executing the schedule of repairs would be not more than £95. He said that he had not had time to take fuller professional advice as to the terms of the repairing covenant or the state of repair existing at the premises and that he did not admit that there had been breaches of covenant. The landlords' surveyor swore an affidavit in which he said that having inspected the premises on April 8 it appeared that no work of repair of any kind had been carried out since his inspection on November 21. He said that the property had in his view seriously deteriorated and that in his opinion at least £1,500 would have to be spent upon it to put it into a state of repair to comply with the covenants of the lease.

On April 17 Master Lawrence made an order setting aside the judgment dated March 27 as being an irregular judgment in that the only leave of the court given under the Act of 1938 was leave to sue the tenant and that no leave to sue the assignee had been given.

The landlords appealed to the judge in chambers, who by order dated May 8 set aside the order of Master Lawrence and ordered that the judgment against the assignee should stand. The judge held that the landlords were under no necessity to serve a fresh notice under section 146 upon the assignee and that they had satisfied the requirement of section 146 by serving a notice upon Kanda, who was the tenant at the date the notice

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was served. The judge considered that the provisions of the Act of 1938 were inapplicable so far as the assignee was concerned.

The assignee appealed, submitting that no notice under section 146 of the Law of Property Act, 1925, had been served upon him and that in the absence of such a notice he could not be sued. For the landlords it was submitted that a notice had been properly served upon the tenant and that he was the "lessee" upon whom the notice had to be served. Counsel submitted that if a notice was properly and validly served on a lessee who later assigned, so far as the Act of 1925 was concerned and so far as the particular breaches complained of were concerned, no further notice had to be served on the assignee before starting an action claiming re-entry or forfeiture as against him.

Maurice Share for the assignee. The purpose of section 146 of the Law of Property Act, 1925, was to ensure that persons affected by forfeiture were given an opportunity to put right the matters of which a landlord complained. If the landlords' submission is accepted in this case, that purpose will be defeated. The assignee can, no doubt, ask for relief against forfeiture, but, as notice has not been served on him, there would be nothing before the court to show whether within a reasonable time of receiving the notice he complied with it or had taken steps to do so. It is difficult, therefore, to see on what grounds his application could be considered.

[PEARCE L.J. The court would consider the conduct of the tenant up to the date of the assignment and the assignee's conduct thereafter. An assignor cannot assign a better right than he himself has.]

The tenant was not endowing the assignee with anything better than he enjoyed himself. He had a lease which could be brought to an end if the landlords complied with the statutory requirements, and that is what he has assigned. The assignee is entitled to the full protection of section 146, and the court should be able on his behalf to take into consideration when he applies for relief what his reaction was to the statutory notice.

Cronin v. *Rogers*[3] is distinguishable, because the issue there was as to the form of the notice, and it is not disputed here that the proper form was used and that service on the tenant was effective—the sole question was as to the assignee. [Reference was also made to *Horsey Estate Ltd.* v. *Steiger*.[4]] Section 196

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[3] (1884) C. & E. 348.

[4] [1899] 2 Q.B. 79; 15 T.L.R. 367.

(2) is not in point here; the vital section is section 146. The two provisions are mutually exclusive.

Section 18 (2) of the Landlord and Tenant Act, 1927, clears up any doubt that might have existed after 1925 and makes it quite clear that as regards lessees within its scope (which includes persons deriving title from the lessee) it is incumbent on the lessor to prove, before he can proceed to forfeit the lease, that after service on the lessee (or in the case of an assignee after service of the notice was brought to his attention) reasonably sufficient time had elapsed to enable him to carry out the necessary repairs. "Any such person" refers to the lessee, and that provision must be construed as one with section 146, which includes the assignee. Section 196 (2) shows that unborn or unascertained persons are contemplated as persons who may be affected by notice. The maximum period of knowledge which can be shown here (January 7 to February 27 or perhaps March 14) is insufficient, having regard to the amount claimed.

As the tenant served a counter-notice on the landlords, section 1 of the Leasehold Property (Repairs) Act, 1938, applies here, and proceedings could only be brought with leave of the court. Leave was obtained to proceed against the tenant, Kanda, but all other proceedings were irregular.

Subsection (5) of section 1 of the Act of 1938 sets out the matters which, if the assignee had no right of audience, might lead to injustice. Some of these are matters on which he alone could assist the court. The court in this case proceeded on uncontradicted evidence as to the diminution in value of the premises said to be due to the dilapidations. The assignee might have been able to refute that evidence. Another matter on which the assignee should have been heard is the question of costs.

Bernard R. Braithwaite for the landlords. It was not necessary for the landlord to serve the assignee. He only had to serve the lessee at the time of the notice. If it were otherwise, a landlord who had complied with all the statutory requirements precedent to proceeding against a lessee up to the point of issue of the writ might have to begin all over again against an assignee. Meanwhile the property would probably be deteriorating. There would indeed be nothing to prevent an assignee from making a further assignment, so that the landlord might be kept out almost indefinitely. Here the landlords are fortunate in that the same solicitor happened to be acting for both sides and the landlords can prove that the assignee took with full knowledge of the true position. That would not always be so, and cannot, of course, affect the construction which should be put on section 146. The vital question is whether service " on the lessee " means service on the person who at that time is holding the premises as lessee, or service on the person against whom proceedings may ultimately be brought. It is contended that the first meaning is correct and that the landlords had to serve the statutory notice only on the person who was the " lessee," as defined, at the time when service fell to be made. It was properly served on Kanda, the then tenant, and could not have been served on anyone else. There is no authority which is directly in point and no assistance can be obtained from the section itself. " Lessee " is used in the same sense in subsections (1) and (2) of section 146, but it may be at a different point of time.

No criticism can be levelled against the landlords in this case, for they went out of their way to see that the position had been explained to the prospective assignee, though there was no obligation on them to do so.

If a landlord serves a section 146 notice on the person who is the lessee at the time of service, he has done all that is necessary, and subject to compliance, where appropriate, with the provisions of the Act of 1938, he can take action to enforce his rights even if, between the date of the service of the notice and the date of commencement of the action, there has been an assignment. Once a notice such as this has been served, the effect attaches to the land and, if the land is assigned, the assignee takes subject to the effect of the notice, for the assignor cannot put his assignee in a better position than he is himself in at the time.

The onus is not on the landlord to show that a reasonable time has elapsed since service of the notice, nor does he have to show that the assignee knew of the service of the notice. These are matters which can be raised by way of defence, but unless raised they will be assumed in the landlord's favour. In this case, however, both matters are clearly in his favour. The assignee knew of the service of the notice and did nothing for two months. Section 18 (2) has, on the facts, no application to the case.

The assignee did not come on to the scene until after leave had been given to proceed against the tenant. He was not, therefore, a person who could have been a party to proceedings under the Act of 1938.

It was not necessary to get leave to proceed against him. The Act of 1938 says simply that " no proceedings shall be . . . " taken " before claiming damages for breach of covenant unless leave of the court is obtained. In this case leave was obtained.

[PEARCE L.J. But the court can impose terms when granting leave: see subsection (6). Here the order gave leave to proceed against the tenant by name. The terms specify with exactitude what leave was being given, and any other proceedings would be without leave.]

At that time it had not been suggested that leave to proceed against anyone else was needed. The landlords knew, it is true, that the tenant was proposing to assign, but they may not have known the assignee's name at that time.

[PEARCE L.J. If the matter had been raised when the case came before me, I should have dealt with it. The order was not restricted deliberately, but that is the order which has been made.]

The landlords had asked for leave to proceed against the "lessee," and the tenant was at that time the lessee. The effect of giving leave was, however, to give leave for proceedings to be brought, that is, to lift the ban generally. An assignee could only be heard on the question of whether leave should be given if at the date of application he had had a right to be heard; in this case he had no right, for he was not a "lessee" then. In deciding whether or not leave to proceed should be given it is the condition of the premises which has to be taken into account. All the relevant facts on that matter were before the court, and in granting leave the requirements of section 1 (3) of the Act of 1938 must have been fulfilled and the lessor must have proved sufficient to satisfy the court under subsection (5). There seems no good reason why the assignee should now be able to reopen the matter. If leave to proceed is granted, it is open to a lessee to apply for relief, but in this case, even if the court were satisfied that the assignee's conduct after the assignment had been such that relief ought to have been granted to him (which is unlikely as he has done nothing and did not even get into touch with a builder until three days after judgment had been signed against him), he would have to spend about £1,500 to put the premises into repair.

Share replied.

Cur. adv. vult.

July 5. MORRIS L.J. stated the facts as set out above, read sections 146 (1), (5) (*b*) and 196 (2) of the Law of Property Act, 1925, and continued:

In my judgment, if there was proper service upon the tenant then when he thereafter assigned there was no necessity to serve a new notice upon the assignee before starting proceedings against him to enforce the right of re-entry or forfeiture. I agree with the judge that the requirement of section 146 is satisfied if the appropriate notice is given to the person who is "the lessee" at the time the notice is given. That was, in my judgment, the position so far as the Act of 1925 was concerned.

The next point taken by Mr. Share depends upon the provisions of the Leasehold Property (Repairs) Act, 1938, which restricts the enforcement of repairing covenants in long leases of small houses. [His Lordship read section 1 (3), (5) and (6) of the Act and continued:] It is to be observed that, whereas under the provisions of section 146 of the Act of 1925 a notice must be served upon the lessee before enforcing a right of re-entry or forfeiture, under section 1 (2) of the Act of 1938 such a notice must also be served, where the Act applies, before claiming damages for breach of covenant to repair.

Applying the provisions of section 1 (3), Mr. Share submits that assuming (contrary to his first submission) that no new notice under section 146 of the Act of 1925 was required to be served upon the assignee, the position was that the tenant as "lessee" had been served with a notice under section 146 and had served a counter-notice pursuant to section 1 of the Act of 1938: that it followed that no proceedings could be taken by the landlords for the enforcement of any right of re-entry or forfeiture or for damages, otherwise than with the leave of the court. He submitted that no leave to bring proceedings against the assignee had been given.

No application for leave to sue the assignee had ever been made. It has not been and could not be contended by the landlords that the leave granted by Master Grundy on February 27 was leave for the purpose of or pursuant to the provisions of the Act of 1938. That was not an originating summons: it was an ex parte application to the master. Mr. Braithwaite, for the landlords, submits, however, that once the court had given leave to bring proceedings, then the provisions of section 1 (3) had met with compliance. He submitted with force that when Pearce J. gave leave on January 14 to commence proceedings against the tenant he gave such leave because there was proof to satisfy section 1 (5). Mr. Braithwaite submitted that once the court had authorized proceedings there was no reason why a new party to the proceedings should not be added. He submitted that the real purpose of section 1 of the Act of 1938 was to prevent proceedings being brought unless there was proof to satisfy section 1 (5), but that once there had been such proof, then the only reason for the necessity of obtaining the leave of the court had been satisfied.

It may well be that, if the court is satisfied that an action should be brought against a lessee, the court would be likely to be satisfied that an action should be brought against an assignee who has gone into possession following upon assignment from the lessee. There might, however, be circumstances under which an assignee who had gone into possession had proceeded at once to remedy all disrepair and to bring it about that the premises were in a condition that satisfactorily complied with the covenants of a lease. It might be, therefore (and it is to be remembered that the provisions now under consideration only apply where more than three years of the term of a lease remain unexpired), that a court would not necessarily be disposed to give leave to take proceedings against an assignee.

Furthermore, an assignee might wish to be heard as to whether, as against him, the lessor should be entitled to the benefit of section 146 (3) of the Act of 1925 (see section 2 of the Act of 1938).

None of these considerations, however, can affect the application of the words of the section or govern its interpretation. The words " no proceedings " are very definite. The permission given by Pearce J. was in terms a permission to sue the tenant. The only proceedings which were authorized were proceedings against him. When it was decided to sue the assignee it seems to me that proceedings were being taken against him for the enforcement of a right of re-entry for breach of covenant and for damages for breach of covenant. The words of section 1 (3) seem to me to require that those proceedings could only be brought with the leave of the court. It may well be that, had application been made in February for leave to start proceedings against the assignee by joining him as a defendant to the action already started against the tenant, it would not have been difficult to persuade the court to give leave. But if after leave to sue the tenant had been given it had been decided not to sue him at all but to sue the assignee, it seems to me that no order of the court was in existence which gave leave to bring such proceedings. As it is, the tenant in respect of whom leave was obtained has not been served with the writs. The words are very definite, " no " proceedings . . . otherwise than with the leave of the court." These are proceedings against the assignee. No leave of the court for those proceedings has been either sought or obtained.

Mr. Braithwaite submitted that the order made by Pearce J. should be construed as giving a general leave to bring proceedings for forfeiture and for damages. But the order is explicit. After hearing counsel for the tenant the court gave leave to commence proceedings against " S. Kanda," the tenant. Though the landlords knew before January 14 that the tenant was proposing to assign and knew shortly after January 14 that an assignment had probably taken place, formal notice of the transfer to the assignee was not sent until February 1. The next step taken was on February 27, when leave was sought and obtained ex parte from the practice master to amend the writ. But at that date the provisions of section 1 of the Leasehold Property (Repairs) Act, 1938, applied. There had been service by the lessors on the lessee of such a notice as is specified in section 146 (1) of the Law of Property Act, 1925. That was the notice served on the tenant. He was the lessee at the time the notice was given. The tenant had served a counter-notice to the effect that he claimed the benefit of the Act of 1938.

Rejecting, as I do, the submission that after the assignment a new notice such as is specified in section 146 (1) of the Law of Property Act, 1925, should have been served upon the assignee, the provisions of section 1 (3) of the Act of 1938 then operated, with the result that " no proceedings by action or otherwise " could be taken by the landlords either to enforce their right of re-entry or forfeiture or to claim damages for breach of covenant to keep or put the premises in repair " otherwise than with the " leave of the court."

Mr. Share addressed a further submission which was based upon the provisions of section 18 (2) of the Landlord and Tenant Act, 1927, but in view of the conclusion which I have reached I need not deal with it.

In the result I consider that Mr. Share fails on his main submission, but that the point taken under the Act of 1938 succeeds. This is the point upon which the master decided the case; but it is only fair to the judge to point out that in the argument before him Mr. Share appears to have concentrated upon the argument that a new notice under section 146 should have been served upon the assignee. The judge rejected that submission, and I agree with his conclusion. The point under the Act of 1938, which was the basis of the master's decision, appears to have been submerged by Mr. Share in his argument before the judge. The point is, however, raised in the notice of appeal and has been argued before us and it is not one that we can ignore.

The view that I have formed makes it unnecessary for me to express any concluded opinion as to whether, if the judgment had been regular, it was appropriate to set it aside so as to give the assignee the opportunity of defending. The master's view was that even if the judgment was regular he would have been prepared to set it aside upon terms or to have given relief from forfeiture on terms. The judge, on the other hand, thought that no sufficient reasons entitling the assignee to leave to defend had been shown. As the judge rightly pointed out, the assignee's case has many features of weakness. He took an assignment with full knowledge of the facts: he knew about the schedule of wants of repair; when served with a writ he failed to enter appearance. Even though he may be a young and inexperienced West Indian student, if he chose to embark upon this transaction and had been in touch with solicitors it is difficult to understand why he did not take proper action when he was sued. Furthermore, his affidavit, which does not read very convincingly, shows that, in spite of all that he knew, it was three days after judgment was signed against him before he consulted a builder. There is a striking disparity between the figure suggested by the assignee and that suggested by the landlords as being the cost of doing requisite work to the premises. No view as between the parties can, however, at this stage be formed. Though the assignee does not very satisfactorily explain his inaction, I incline to the view that I would nevertheless have been reluctant to deprive him of any opportunity of defending the action and if necessary of seeking relief from forfeiture.

I think that the appeal succeeds and that the order made by the master should be restored.

PEARCE L.J. I agree.

Appeal allowed and order of the master restored.

Solicitors: *Scott, Winter & Co.; Trower, Still & Keeling.*

E. D.

C. A.

REGIS PROPERTY CO. LTD. *v.* DUDLEY.

1957
Dec. 12, 16.
1958
Feb. 7.

Jenkins, Sellers and Pearce L.JJ.

Landlord and Tenant — Rent restriction — Rent limit — Appropriate factor — Tenant's liability for repairs under terms of tenancy — Concurrent liability at common law — "Fair wear and tear"— Services—Reasonable charge—Depreciation of plant—Profit—Rent Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 25), *ss.* 1, 2, *Sch. I, paras.* (1), (2) *and* (3).

Landlord and Tenant—Repairs—Covenant—"Fair wear and tear"—Meaning.

The landlords of a block of flats made application in the county court for orders determining the increase of rent permissible under the Rent Act, 1957,[1] in respect of one of the flats.

The flat in question was let unfurnished, at an inclusive rent of £139 16s. 9d. per annum, which, owing to an increase of rates, had been increased to £145 12s. 5d. It was entered in the 1956 valuation list at a gross value of £54 per annum and a net value of £39, and therefore, being situate in London and the net value not exceeding £40, the flat remained under control. The obligations of the tenant under the lease were, inter alia, to keep the interior of the flat in good and substantial repair and clean sanitary condition, fair wear and tear and damage by accidental fire excepted.

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[1] Rent Act, 1957, s. 1: "(1) Subject to the following provisions of this Act the rent recoverable for any rental period from the tenant under a controlled tenancy shall not exceed the following limit, that is to say a rent of which the annual rate is equal to the 1956 gross value of the dwelling multiplied by two (or, if the responsibility for repairs is such as is specified in Part I of the First Schedule to this Act, by the appropriate factor specified in the said Part I), together with— (*a*) the annual amount, ascertained in accordance with the Second Schedule to this Act, of any rates for the basic rental period, being rates borne by the landlord or a superior landlord; and (*b*) such annual amount as may be agreed in writing between the landlord and the tenant or determined by the county court to be a reasonable charge for any services for the tenant provided by the landlord or a superior landlord during the basic rental period or any furniture which under the terms of the tenancy the tenant is entitled to use during that period. (2) The limit on the rent recoverable under a controlled tenancy for any rental period (hereinafter referred to as 'the rent 'limit') shall be subject to adjustment from time to time under sections 3 to 5 of this Act and to reduction as provided by Part II of the First Schedule to this Act in case of disrepair."

First Schedule, Part I: "1.—(1) The following provisions shall have effect in ascertaining the rent limit by reference to the 1956 gross value. (2) If under the terms of the tenancy the tenant is responsible for all repairs, the appropriate factor shall be four-thirds. (3) If under the terms of the tenancy the tenant is responsible for some, but not all, repairs, the appropriate factor shall be such number less than two but greater than four-thirds as may be agreed in writing between the landlord and the tenant or determined by the county court."

Para. 2 (1): "In the foregoing paragraph the expression 'repairs' does not include internal decorative repairs. . . ."

By section 25 the "appropriate factor" is defined as "the number by which the 1956 gross value is to be multiplied in determining the rent limit"; and the "basic rental period" is defined as being "the rental period comprising the commencement of this Act . . ." The Act was passed on June 6, 1957, and by section 27 (1) it came into force at the expiration of one month thereafter.

The county court judge fixed the appropriate factor at $1\frac{2}{3}$, holding that the liability of the landlords and tenant for repairs was about equal. He disallowed charges for replacement or depreciation of certain services and also a claim of 10 per cent. overall profit on all items of cleaning and maintenance.

On appeal by the landlords:—

Held, (1) that the Act gave no specific guidance as to the principles on which the court was to determine the appropriate factor, but it was plain that it must be guided by the extent of the burden, short of full repairing liability, cast on the tenant by the terms of the letting. The fixing of the exact figure was a matter of discretion. Repairs which were the responsibility of the tenant under the express terms of the agreement should be taken into account notwithstanding that he might be under a concurrent liability for them at common law. The judge had estimated the tenant's liability for repairs at a figure which the court regarded as generous, with a consequential lowering of the appropriate factor to $1\frac{2}{3}$, but it was not possible to say that he was wrong in so doing.

(2) That in computing a reasonable charge for services some allowance must as a rule be made for depreciation of wasting assets, in order to arrive at a reasonable charge. This was not a pure question of fact, and the judge was not entitled to disregard those items as a matter of discretion. Depreciation and not replacement was the correct element to be considered, and the yearly figure of depreciation should be arrived at with respect to each category of plant by taking the actual costs of such plant when originally installed and dividing it by the number of years comprised in its actual past and estimated future life.

(3) That in the computation of a reasonable charge for services there should be allowed to the landlords a fair figure by way of profit in the particular circumstances. Prima facie some profit should be allowed in a reasonable charge. The landlords had the ultimate responsibility and it was fair that they should have some profit to compensate for this. Had the Act otherwise intended it would have used words based on "cost" instead of reasonable charge.

APPEALS from Judge Sir Gerald Hargreaves, sitting at West London County Court.

The plaintiffs, Regis Property Co. Ltd., appealed from three orders made on August 29, 1957, by the county court judge under the Rent Act, 1957, with regard to flat No. 248, Chelsea Cloisters, S.W.3, of which the defendant, Henry Dudley, was the tenant. The proceedings were brought on the basis that the decision of the court might give guidance on various principles involved in the Act in respect of a large number of flats owned by the landlords, and the landlords had indemnified the tenant against the costs.

The flat was one of a block of 804 flats built in 1939, and consisting of a basement and 10 floors. It was let unfurnished and contained two rooms, a kitchenette, a hall and a bathroom. The landlords supplied a wireless set, a refrigerator and a gas cooker. They also provided central heating with radiators and towel rails, constant hot water, and a lift, also lighting and cleaning the common parts of the premises. The flat was let to the tenant on April 10, 1956, by a written agreement, on a monthly tenancy at an inclusive rent of £139 16s. 9d. per annum, payable monthly. By July 6, 1957, when the Act of 1957 came into force, the rent, owing to an increase of rates, had been increased to £145 12s. 5d. per annum. The gross value of the flat appeared in the 1956 valuation list as £54 per annum and the net rateable value £39. Therefore, being situate in London and the net rateable value not exceeding £40, it remained under the control provided by the Act of 1957.

By their applications to the county court, the landlords sought to obtain determinations under the Act of (a) the amount of the appropriate factor, (b) the amount of a reasonable charge for services provided by them, and (c) the resultant rent which they could properly charge, so that they might give the appropriate notice of increase under section 2 of the Act.

The county court judge held that the tenant's liability for repairs was about equal to that of the landlords, and he fixed the appropriate factor at 1⅔. In computing a reasonable charge for services he disallowed certain items in respect of replacement or depreciation of boilers, lifts and electrical wiring and fittings in the passages, and also disallowed a 10 per cent. overall profit on service maintenance and replacements which the landlords claimed.

The landlords appealed.

Neil Lawson Q.C. and *Brian Galpin* for the landlords. The Rent Act, 1957, contains a fundamental departure from the earlier legislation affecting premises remaining under control. Broadly speaking, until the coming into force of the Act of 1957 any question affecting an allowance for repairs or charges for services provided by the landlord included in the rent of controlled premises was dependent upon actual expenditure by the landlord.

That was very different from the reasonable charge allowed under the new Act. In the present case there are disputes as to the "appropriate factor"—what the multiplying figure, ranging from 2 to $1\frac{1}{3}$ of the gross value, was to be, and what was a reasonable charge for services. Because of these disputes the parties were unable to come to an agreement as to the basic rent, and the landlords therefore made these applications to the county court. The judge gave effect to the fair wear and tear clause in the tenancy agreement and nevertheless came to the conclusion that the responsibility of the tenant for repairs was about equal to the responsibility of the landlords. He therefore fixed the "appropriate factor" at $1\frac{2}{3}$. It is submitted that the judge was in error; that on a proper reading of the agreement and the Act the tenant's liability for repairs, by virtue of the fair wear and tear exceptions, should be considered as merely nominal; further, that all liability of the tenant that does not arise solely under the agreement must be excluded. For instance, the tenant would be liable at common law for damage caused by his acts of negligence, but that liability should not be regarded as a liability for the purpose of this investigation, since the Act specifically refers to the tenant's responsibility under the terms of his agreement. The judge has put the wrong weights into the scales. He has also refused to allow a replacement fund in estimating the charge for services and a profit factor of 10 per cent. This court is invited to indicate the principles to be applied in deciding these questions. The figures can then be worked out by the parties.

[The following cases were cited: *Taylor* v. *Webb*[2]; *Brown* v. *Davies*[3]; *Gutteridge* v. *Munyard*[4]; *Haskell* v. *Marlow*[5]; *Davies* v. *Davies*[6]; *Regis Property Co.* v. *Redman*[7]; *Reg.* v. *Paddington North and St. Marylebone Rent Tribunal*[8]; *Terrell* v. *Murray*[9]; *Miller* v. *Burt*[10]; *Lurcott* v. *Wakely and Wheeler*[11]; *Stanley* v. *Towgood*,[12] and *Lister* v. *Lane*.[13]]

Ian Campbell Q.C. and *G. Avgherinos* for the tenant. There are two matters raised by this appeal, (1) what is the appropriate factor, and (2) what is a reasonable charge for services provided by the landlord? The appropriate factor is a matter which has to be decided by the county court, which has an overriding jurisdiction. Once the county court has determined the appropriate factor, a question of fact, this court has no jurisdiction to entertain an appeal unless it is shown that the county court judge has misdirected himself. In view of the evidence led in the court below, this court should not interfere. Under clause 2 (C) of the tenancy agreement some duty to repair must fall on both landlords and tenant and there is no need to read into clause 2 (C) any qualification with regard to fair wear and tear exceptions. It is an absolute unqualified covenant. It is a very onerous condition for the tenant. Liability for an unqualified covenant could be extremely onerous. Damage by a burglar or by an aeroplane could be covered by the tenant's liability to repair and would not be covered by a fair wear and tear exception. There is authority for the view that the exception does not cover damage caused by a catastrophe: see *Manchester Bonded Warehouse Co.* v. *Carr.*[14] As to the meaning of fair wear and tear, see the dictum of Bruce J. in *Terrell* v. *Murray.*[15] Sankey J. in *Citron* v. *Cohen*[16] referred to *Terrell* v. *Murray*[17] as the primary case. The application of the fair wear and tear exception did not reduce the tenant's liability to what could be termed a minimum. It would still be extensive, and the judge was correct in considering the obligations of the tenant and disregarding any submission as to his possible liability if there had been no covenant.

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[2] [1937] 2 K.B. 283.
[3] [1957] 3 W.L.R. 818.
[4] (1834) 1 Moo. & Rob. 334.
[5] [1928] 2 K.B. 45.
[6] (1888) 38 Ch.D. 499.
[7] [1956] 2 Q.B. 612.
[8] [1956] 1 Q.B. 229.
[9] (1901) 17 T.L.R. 570.
[10] (1918) 63 S.J. 117.
[11] [1911] 1 K.B. 905.
[12] (1836) 3 Bing.N.C. 4.
[13] [1893] 2 Q.B. 212.

In regard to the reasonable charge for services and the question of depreciation, the judge was not deciding a question of law, but considered that in the circumstances he was not entitled to allow the sum claimed by the landlords. In some circumstances it would be proper to allow a reasonable sum for replacement of services, but not for matters which might be considered to be part of the flat as let. It would not be right to allow for the future replacement of services which may never be made during the occupation of the tenant. The decision of the judge was fully justified. As to the claim for profit on maintenance, the judge was abundantly justified in not acceding to the claim for 10 per cent. profit. The landlords' subsidiary maintenance company makes a profit which it gives back to the parent company.

Cur. adv. vult.

February 7. PEARCE L.J. read the judgment of the court, in which he stated the facts and continued: In the case of controlled houses the Rent Act, 1957, has departed from the principle of the standard rent. The landlord is allowed, on compliance with the somewhat complicated provisions as to notices of increase contained in section 2 of the Act, to charge a rental calculated, in the way mentioned below, on the 1956 gross value of the dwelling-house, together with certain additions for services provided by the landlord and for rates where the landlord is responsible for them.

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[14] (1880) 5 C.P.D. 507, 513.

[15] 17 T.L.R. 570.

[16] (1920) 36 T.L.R. 560.

[17] 17 T.L.R. 570.

There are thus three elements in the permitted rent. 1. The basic rent, which is the gross value multiplied by a figure (termed "the appropriate factor") ranging from two where the tenant is under no responsibility for repairs to four-thirds where the tenant is responsible for all repairs, the intermediate figure appropriate to any case in which the tenant is partially, but not wholly, responsible being such as may be agreed between the parties in writing or determined by the county court. 2. The rates which the landlords bear. 3. A reasonable charge for services which may be agreed in writing or determined by the county court.

In this case the appellant landlords made three applications to the county court to obtain determinations under the Act of: (a) the amount of the appropriate factor; (b) the amount of a reasonable charge for services provided by them; and (c) the resultant rent which they could properly charge, so that they might give the appropriate notice of increase under section 2. From the orders made on each application the landlords now appeal.

[His Lordship read section 1 (1) and (2) and First Schedule, Part I, para. (1), of the Act of 1957, and continued:] By paragraph 2 (1) of the same Part of the same Schedule: "In the foregoing paragraph the expression 'repairs' does not include "internal decorative repairs. . . ." The subsection then deals with matters not material to this appeal. By section 25 the "appropriate factor" is defined as the number by which the 1956 gross value is to be multiplied in determining the rent limit; and the "basic rental period" is defined as being "the rental period "comprising the commencement of this Act." The Act was passed on June 6, 1957, and by section 27 (1) it came into force at the expiration of one month thereafter.

It may be noted that while sections 3 and 4 of the Act respectively provide for the adjustment of the rent limit to meet variations in rates or in the amount which it is reasonable to charge for services, there is no provision for the alteration of what we have termed the basic rent (i.e., the rent so far as fixed by applying the appropriate factor to the 1956 gross value) save in respect of improvements under section 5. The basic rent in the present case would be £108 with an appropriate factor of two and £72 with an appropriate factor of four-thirds. It may also be noted that the allowance of a reasonable charge for services in fixing the rent involved a fundamental departure from the earlier Acts. Broadly speaking, before 1957 any question affecting the landlord's right to increase his rent by any allowance for repairs or charge for services rendered was based on the landlord's actual expenditure. There is here a dispute: (a) As to what is the appropriate factor in this case, and (2) as to what is a reasonable charge in this case.

The question of what is the appropriate factor turns on the repairing obligations of the tenant. Having regard to those obligations, at what figure between the figure two, which would have been applicable if he had been under no obligation to repair, and the figure of one and one-third, which would have been applicable if he had been under full repairing obligations, should the appropriate factor be set? The Act gives no specific guidance as to any principles on which the court is to make that determination, but it is plain that it must be guided by the extent of the burden, short of full repairing liability, cast on the tenant by the terms of the letting in deciding whether the just rent is near the upper limit of two or the lower limit of one and one-third or somewhere else between those two figures. The fixing of the exact figure is, in our view, a matter of discretion. Here, the judge fixed it exactly half-way between those limits on the ground that the burden of the tenant's liability for repairs was roughly equal to that of the landlords'. If he is correct in his view as to their respective burdens this court plainly should not interfere. If, however, the judge came to an erroneous conclusion as to the nature and extent of the tenant's or landlords' legal obligation as to repairs, it follows that his discretion would have been exercised on a wrong basis and it would be proper for us to vary his conclusion.

Under clause 1 of the tenancy agreement the flat is expressed to be let "Together with the use of all the fixtures and fittings "therein and together with the right in common with the land-"lord and the tenants of the other flats in the said building and "all others having the like right to use for purposes only of "ingress to and egress from the flat the entrance hall passages "stairs and passenger lifts of the said building . . ." and subject to reservations which include the right for the landlords to enter the flat at all reasonable times for the purpose of inspecting and repairing the same.

The obligations of the tenant under the agreement are, inter alia, as follows: Under clause 2 (C): "To keep the interior of "the flat together with all the fixtures and fittings now or "hereafter therein (including the doors windows sanitary and "water apparatus thereof) in good and substantial repair and "clean sanitary condition (fair wear and tear and damage by "accidental fire excepted), and so to deliver up at the end or "sooner determination of the tenancy." Under clause 2 (E): "To observe and perform the rules and regulations specified in "the schedule thereto or any reasonable modification thereof or "additions thereto made from time to time by the landlord for "the proper conduct of the building and of which notice shall be "given to the tenant in writing or left for the tenant at the flat. "The tenant shall accept as final and binding the landlord's "decision upon any matter arising out of the said rules and "regulations or any such modifications thereof or additions "thereto."

Rule and Regulation (1) provides: "Tenants shall keep all "baths sinks cisterns and waste and other internal pipes in or "connected with their flats clean and open and in proper repair "and order and shall be responsible for all damage occasioned "to their own or other flats through any breach of this rule or "through the improper use or negligence of themselves or their "servants or through the stopping up or bursting of the said "baths sinks cisterns or pipes due to the negligence of the tenants "or their servants and shall carry out during the tenancy any "works required to the internal water pipe fittings apparatus, "etc., to comply with any notices served by the Metropolitan "Water Board or the local sanitary authority."

The obligations of the landlords under the agreement are, inter alia, as follows: Under clause 3 (B): "To pay the rates ". . . charged on or payable in respect of the flat . . . together "with the sum payable in respect of the wireless relay service "to the flat." Under clause 3 (C): "To supply and use its best "endeavours to maintain at all times at its own cost an efficient "service of hot water for domestic purposes through the central "heating installation and for the heating of the radiators to the "flat through the central heating installation . . ." Under clause 3 (D): "To light the staircase landings and corridors of "the building . . ."

As to the tenant's responsibility for repairs, the judge read rule 1 as being subject to the fair wear and tear clause in 2 (C), and held that the landlord could not put on the tenant under rule 1 any obligation which would be excluded by an express fair wear and tear clause. He also held that in fact the landlords had taken upon themselves to repair washers, etc., and, by sending a notice to tenants, had in practice modified the effect of rule 1. That notice reads as follows: "Re Water Taps. In "cases where taps require washering (that is to say where water "continues to drip when the tap is turned off) or re-seating "(where there is noise or vibration when the tap is turned) "tenants are particularly requested to report this to the Porter's "Lodge, when the landlords will be pleased to effect repairs "without charge to the tenant."

The judge heard a considerable body of evidence. In particular he had before him two experienced surveyors, Mr. Dale, on behalf of the landlords, and Mr. Russell Davies, on behalf of the tenant. Mr. Dale had the advantage of actual figures spent by the landlords on this and similar flats in respect of exterior repairs, and actual figures spent by the landlords for interior repairs in respect of comparable furnished flats where they had a liability for them. In the result the judge held that the landlords were liable in this case for: (a) all exterior repairs; (b) all interior repairs necessitated by fair wear and tear; and (c) plumbing repairs for which they had assumed responsibility under the notice to tenants that I have read. He held that the tenants' responsibility under 2 (C) and regulation 1 was only to do repairs that were not due to fair wear and tear, i.e., repairs due to a wrongful act or inadvertence of the tenant. He assessed these as about equal to the landlords' responsibility for repairs.

In his judgment he said: "Mr. Dale's evidence is based upon "a mathematical calculation of annual expenditure by the "applicants over a period of five years in the case of Chelsea "Cloisters. It appears to me to amount to this. The landlord's "liability should be arrived at by allowing the sum of £5 10s. "for the flat in respect of the exterior and common parts of "Chelsea Cloisters, so far as they are part of the 'dwelling' "under the interpretation clause of the Act (excluding, therefore, "the restaurant and squash court, and everything in fact which is "not included in a dwelling) and taking £4 (later agreed by the "parties at £4 5s.) as the yearly sum attributable to the interior "repairs of the flat. Mr. Dale deducts from this figure 10s. 6d. "for the tenant's four-thirds liability under clause 2 (C) of the "agreement, which contains the fair wear and tear clause, and "also £2, that being his estimate of the tenant's liability under "schedule 1 of the rules and regulations attached to the tenancy

" agreement. This means that the landlord's liability for repairs " to the flat amounts to £5 10s. plus the figure of £4 5s. less " the £2 10s. resting upon the tenant, which reduces the £4 5s. " to £1 15s. In other words, the landlord's liability is £7 5s., " whereas the tenant's liability will be 10s. 9d. (about) under " clause 2 (C) of the agreement, plus another £2 under the regu- " lations, which makes the tenant's liability £2 10s. 9d. in all. " That is a proportion of 14 to 6 as between the landlord and the " tenant."

In dealing with the other evidence the judge continued: " So far as expenditure on the exterior and common parts of the " building is concerned, I take the view that Mr. Dale's figures " are more probably, indeed almost certainly, correct, and I " allow £5 10s. for this item. So far as the repairs to the flat " itself are concerned I will accept Mr. Dale's figure of £1 15s., " which is based on actual expenditure by the landlord over five " years (that is to say, £4 5s. less the tenant's liability of " £2 10s.) as correct. That leaves a total to the landlord of " £5 10s. plus £1 15s., or £7 5s. in all. That is the sum total " of the landlord's liability for repair of the flat. In my view, " however, the tenant's liability should be put at a far higher " figure than the £2 10s. that Mr. Dale allows, even taking into " account the fair wear and tear clause, as, of course, I must do. " My reason for forming this opinion is that in the case of a flat " such as this, where most of the fixtures and fittings are metal " or porcelain, or where all are indoors, the fair wear and tear " will be very small and may be regarded in some cases as " almost negligible. The main articles that will have to be " replaced by the landlord under the fair wear and tear clause " are the electric light bulbs and the washers on the taps. These " latter the landlord has specifically undertaken to be responsible " for by circulating the undated slip to which I have already " referred, although it appears to me that under the fair wear " and tear clause the landlord will be liable for this in any case. " The tenant, however, remains liable for all the rest of the repairs " inside the flat. I have in mind such items as the following: " (a) keeping waste pipes unblocked, and (b) repairing basins " cracked by dropping articles into them, for example, tooth " glasses, bottles, hairbrushes or tumblers; breaking the chain " or the handle, or whatever the contrivance is, of the lavatory " cistern, chipping the bath enamel; repairing damage to the " walls, caused, for example, by driving in nails or rawlplugs for " pictures and photographs; breaking the bath panel or a window

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"pane; damage to the fittings of the kitchenette; damage to the "woodwork from cigarette ends where more serious than mere "decoration can repair; and, more rarely, damage from the "flooding of his own or adjoining flats. All these are the sort of "things that happen in flats, and they cannot be regarded as "fair wear and tear. I take the view that even allowing for "the fair wear and tear clause the tenant's liability should be "assessed at not less than £7 7s. per annum in all. This view "does not necessarily conflict with Mr. Dale's figures, because "tenants who do damage which is obviously not fair wear and "tear have no motive for reporting it, and are more than likely "to put it right without the landlord knowing anything about it. "If they do report it the landlord's manager will probably tell "them that the landlord is not responsible for the carelessness "of the tenant. As I take the view, therefore, that as nearly "as I can form an estimate, the cost of repairs to the dwelling "is shared about equally between the landlord and tenant, I "hold the appropriate factor to be $1\frac{5}{8}$ of the gross value."

Mr. Lawson argues that the judge was in error in taking that view; that on a proper reading of the agreement and the Act the tenant's liability should, by virtue of the fair wear and tear exception, be considered nominal; and further, that one must exclude all liability of the tenant that does not arise solely under the agreement. The tenant would be liable for damages caused by acts of negligence at common law, but this liability should not be regarded as a liability for the purpose of this investigation, since the Act specifically refers to the tenant's responsibility under the terms of his agreement. Moreover, he argues, it is wrong on common sense grounds to credit the tenant, so to speak, with repairs that are due to his own negligence, since this is putting a premium on negligence. The only repairs that can properly be debited to the tenant are those which are not fair wear and tear, yet are not sufficiently blameworthy to be described as negligence or to make the tenant liable at common law apart from the covenant. If these arguments are correct, the judge has, as a matter of law, put the wrong weights into the scales, and therefore this court should alter his findings.

The question of what effect the wear and tear exception has on the tenant's liability has been much canvassed before us. The cases are not altogether easy to reconcile and no doubt each case must largely depend on its particular facts. We think that the clearest definition is that which was given by Bruce J. in

Terrell v. *Murray*,[1] where he said: "That it was a little curious "that there was no very satisfactory authority as to the meaning "of the words fair or reasonable wear and tear. He could not "agree with Mr. Bosey when he said that no meaning ought "to be given to the words at all, nor could he agree that they "had no operation in regard to the outside of the premises. The "meaning of the covenant in his opinion was that the tenant was "bound at the end of the tenancy to deliver up the premises "in as good condition as they were in at the beginning subject "to the following exceptions, that was to say, dilapidations "caused by the friction of the air, dilapidations caused by "exposure, and dilapidations caused by ordinary use."

That definition was adopted by Sankey J. in *Citron* v. *Cohen*.[2] To that definition we would add the words of Lord Evershed M.R. in *Brown* v. *Davies*,[3] with reference to a fair wear and tear exception: "I do not think it necessary or right that I should "attempt to give an exposition of the exact scope of this pro-"vision. I am satisfied to put it no higher than that if proof is "given that the tenant is not keeping the premises in a fair and "tenantable manner and not keeping the interior clean and well "repaired and decorated, then at the very least the tenant must "establish that the matters complained of ought to be attributed "to dilapidation or damage resulting from reasonable wear and "tear and to nothing else."

Romer L.J. said[4]: "The truth is that, in order to find out "the scope and effect of a qualified covenant to repair, you have "got to look at the document as a whole, and it appears to me "to be going far beyond anything that was said by any of the "judges in *Taylor* v. *Webb*[5] to say that you merely have to find "an exception for reasonable wear and tear to reduce the scope "of the covenant to practically nothing at all."

The tenant's repairing covenant in this case being only in respect of the internal repairs, no consideration of the effect of the weather comes into it; and by the terms of the Act any element of decorative repair has to be eliminated from it for the purposes of this inquiry. We do not feel able to accept the view that the fair wear and tear exception in clause 2 (C) should be read without qualification into rule 1, since it seems inappropriate to the obligations in regard to various specific matters imposed by the

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[1] (1901) 17 T.L.R. 570.

[2] (1920) 36 T.L.R. 560.

[3] [1958] 1 Q.B. 117, 127; [1957] 3 All E.R. 401.

[4] [1958] 1 Q.B. 117, 130.

[5] [1937] 2 K.B. 283; 53 T.L.R. 377; [1937] 1 All E.R. 590.

"pane; damage to the fittings of the kitchenette; damage to the "woodwork from cigarette ends where more serious than mere "decoration can repair; and, more rarely, damage from the "flooding of his own or adjoining flats. All these are the sort of "things that happen in flats, and they cannot be regarded as "fair wear and tear. I take the view that even allowing for "the fair wear and tear clause the tenant's liability should be "assessed at not less than £7 7s. per annum in all. This view "does not necessarily conflict with Mr. Dale's figures, because "tenants who do damage which is obviously not fair wear and "tear have no motive for reporting it, and are more than likely "to put it right without the landlord knowing anything about it. "If they do report it the landlord's manager will probably tell "them that the landlord is not responsible for the carelessness "of the tenant. As I take the view, therefore, that as nearly "as I can form an estimate, the cost of repairs to the dwelling "is shared about equally between the landlord and tenant, I "hold the appropriate factor to be 1⅗ of the gross value."

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Terrell v. *Murray*,[1] where he said: "That it was a little curious "that there was no very satisfactory authority as to the meaning "of the words fair or reasonable wear and tear. He could not "agree with Mr. Bosey when he said that no meaning ought "to be given to the words at all, nor could he agree that they "had no operation in regard to the outside of the premises. The "meaning of the covenant in his opinion was that the tenant was "bound at the end of the tenancy to deliver up the premises "in as good condition as they were in at the beginning subject "to the following exceptions, that was to say, dilapidations "caused by the friction of the air, dilapidations caused by "exposure, and dilapidations caused by ordinary use."

That definition was adopted by Sankey J. in *Citron* v. *Cohen*.[2] To that definition we would add the words of Lord Evershed M.R. in *Brown* v. *Davies*,[3] with reference to a fair wear and tear exception: "I do not think it necessary or right that I should "attempt to give an exposition of the exact scope of this provision. I am satisfied to put it no higher than that if proof is "given that the tenant is not keeping the premises in a fair and "tenantable manner and not keeping the interior clean and well "repaired and decorated, then at the very least the tenant must "establish that the matters complained of ought to be attributed "to dilapidation or damage resulting from reasonable wear and "tear and to nothing else."

Romer L.J. said[4]: "The truth is that, in order to find out "the scope and effect of a qualified covenant to repair, you have "got to look at the document as a whole, and it appears to me "to be going far beyond anything that was said by any of the "judges in *Taylor* v. *Webb*[5] to say that you merely have to find "an exception for reasonable wear and tear to reduce the scope "of the covenant to practically nothing at all."

The tenant's repairing covenant in this case being only in respect of the internal repairs, no consideration of the effect of the weather comes into it; and by the terms of the Act any element of decorative repair has to be eliminated from it for the purposes of this inquiry. We do not feel able to accept the view that the fair wear and tear exception in clause 2 (C) should be read without qualification into rule 1, since it seems inappropriate to the obligations in regard to various specific matters imposed by the

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[1] (1901) 17 T.L.R. 570.

[2] (1920) 36 T.L.R. 560.

[3] [1958] 1 Q.B. 117, 127; [1957] 3 All E.R. 401.

[4] [1958] 1 Q.B. 117, 130.

[5] [1937] 2 K.B. 283; 53 T.L.R. 377; [1937] 1 All E.R. 590.

The second arises in respect of the landlords' claim to be allowed an element of profit on all the items of cost and, in particular, certain items of cleaning and maintenance which are carried out by a wholly owned subsidiary of the landlords. The judge disallowed the 10 per cent. overall profit which the landlords claimed.

So far as the first point is concerned, it seems to us that, once it is conceded (as it must be and is in this case) that the plant in question is necessary in order to provide the services, some provision for its depreciation or replacement must be included in any computation of the reasonable charge for those services. In 1956 the landlords spent £5,000 in renewing the boilers; in 1955 they spent £3,500. They have not brought these sums into account since, in their view, it would be capricious and unscientific to take particular years; they prefer to put forward an item representing an average annual allowance for depreciation, or sinking fund for replacement, calculated on the estimated life of the plant. In our view, no computation of a reasonable charge can be made without taking some such item into consideration. The life of plant used in providing a service is one of the important matters to be considered in finding out both what the provision for the service costs and what is a reasonable charge for it.

The judge held that these items were almost as much a part of the original building as the roof and staircase. "They "belong" he said, "rather to what is actually let to the tenant, "that is they appear to be part of the dwelling rather than to be "part of the services supplied with it." He also held that they were really items for replacement and were "a charge against "the present tenants for the benefit of the landlord in many "years' time." With respect to the judge, we think this is an erroneous view. With any wasting asset such as plant some allowance must as a rule be made for depreciation if one is to arrive at a reasonable charge. We cannot accede to the argument that this was a pure question of fact and that here the judge was entitled to disregard those items as a matter of discretion. In our view, he was wrong in excluding depreciation or replacement from consideration.

He also held the view that if any such item were allowed, the appropriate basis would be replacement rather than depreciation, and that "replacement" as distinct from "repair" could not reasonably be regarded as a service to the tenant. But the question is not whether a provision for depreciation or replacement is a service to the tenant, but whether a provision in one or other of these forms for the wearing out of the plant can properly be allowed as part of the cost of providing the services for the provision of which the plant is required. The landlords' claim under this head is in fact based on the estimated cost of replacement which, in view of the great increase in prices which has taken place since 1939, would be much more favourable to them than an allowance based on a yearly depreciation allowance calculated on the original cost. As the judge observed, the replacement basis "from the point of view of "prudent business dealing" is "the only safe way of calculating "a sinking fund." But it does not follow that the whole of the yearly provision which prudent business dealing might dictate can reasonably be charged against the tenant as part of the cost of the services which he enjoys.

As we understand the evidence, the landlord's calculation involves (a) estimating the total cost of providing at present prices new plant comparable to the existing plant; (b) estimating the period to be taken as representing the future life of the existing plant from the present time onwards; and (c) dividing the estimated cost at present prices of new plant of each category by the number of years representing the estimated future life of the existing plant of each category. The resulting figure with respect to each category of plant is then brought into the computation of the cost of providing the services rendered by means of the plant. It seems to us that this method of calculation places too heavy a burden on the tenant. It saddles him with the proportion attributable to his flat of the cost of providing the landlords with new plant which in fact may never be provided during his tenancy. The matter is not free from argument but it is, we think, concluded by the fact that the landlord can always apply to the court under section 4 to increase his charge if and when he instals his expensive new plant. In our view, depreciation and not replacement is the correct element to consider under this heading, and the yearly figure of depreciation should be arrived at with respect to each category of plant by taking the actual cost of such plant when originally installed (whether in 1939 or at some later date), and dividing it by the number of years comprised in its actual past and estimated future life.

In our view, the figure allowed for depreciation should not take into account the hot towel rails and radiators in the flat. Although they are an indispensable adjunct to the hot water service, yet they were in fact expressly let as part of the fixtures in the flat and, as such, fall to be dealt with in matters relating to the rent, and not as an item in estimating what is a reasonable charge for the provision of hot water. We understand that once the principle is decided the parties will have no difficulty in calculating the resulting figures, and we are not to be concerned with the details. It seems, therefore, that it will not be necessary to send the case back for rehearing.

There remains the question whether there should be allowed to the landlords any item of profit and, if so, how it should be calculated. The landlords claim that 10 per cent. on the total costs should be allowed as profit. They urge that this is a small percentage compared to the common run of commercial profits. They point out that if their figures were accepted in toto the charge to the tenant would still be reasonable, namely, 24s. per week for central heating, wireless, porters, lifts, and cleaning, heating and lighting of communal parts of the building, whereas in fact the judge allowed about 15s. per week, which they say is unreasonably low.

The judge considered an observation of Goddard L.J., delivering the judgment of the Court of Appeal in *Bell Property Trust Ltd.* v. *Hampstead Assessment Committee*,[7] that quarter sessions had allowed a deduction for profit on the ground that "the landlords would not provide these services and amenities "for the bare cost, but would want a return on their outlay," and that that seemed very reasonable to the court. The judge went on to say: "To the credit of the landlords in the present "case I do not think this consideration applies, as it is conceded "that they are good landlords, anxious for the comfort and "welfare of the tenants. They are unlikely, I feel, to reduce "their services unless they are allowed a profit on them. On "the whole, therefore, I take the view that dealing as I am "with a new Act of Parliament I am intended by the legislature "to be free to decide either way whether a reasonable charge for "services should in this particular case include a profit or not. "If it had been intended that I should not be free to include "profit the simplest way would have been to allow merely the "actual cost of services, instead of using the phrase 'a reasonable charge,' and I must, therefore, decide whether in the "present case a reasonable charge for services should include a "profit on such services.

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[7] [1940] 2 K.B. 543, 556; 57 T.L.R. 10; [1940] 3 All E.R. 640.

"I have come to the conclusion that in this particular case "it should not, and my reasons are the following: (i) that even "at the present rent Chelsea Cloisters is not being run at a loss, "and can show a profit after setting aside a fund for replacements and after meeting rates; (ii) that what is more important "still is that the sum allowed for repairs under the Act, that is "to say the difference between £54 plus one-third (that is £72), "and twice £54 (that is £108), which is £36, of which I am "allowing one-half to the landlord and one-half to the tenant, "will show them a greatly increased profit, as a result of this "Act, on what they are now making. Generally speaking, the "result of the Act, without allowing a profit on the cost of the "services, will be to add very considerably to the profit already "being made by the landlord out of the running of Chelsea "Cloisters, and this profit, naturally and quite properly, will be "at the expense of the tenant. The further reason is that a "profit on some of the services appears to me to be made by "the appellants' Maintenance Company, and that should not be "made twice over. Consequently, in this particular case, I "have come to the conclusion that a reasonable charge for "services should not include a profit on them."

The last reason given by the judge seems to us an adequate reason for not allowing any profit on the items of maintenance done under contract by the landlords' wholly owned subsidiary company. The evidence seems to us to establish that that company having made a full (but fair) charge, including a profit to themselves, then gave to the landlords a rebate consisting of the resulting profit to that company. As the judge allowed the subsidiary company's full charges, it followed that the rebates received by the landlords constituted a profit to them in respect of those items.

So far as concerns other items, however, we do not feel that the two reasons given by the judge are valid reasons for allowing no profit. We find no clear evidence that the unit of Chelsea Cloisters (which is one of many properties owned by the landlords) was in fact not being run at a loss. There was certainly no evidence that the controlled tenancies therein were not being run at a loss. But in any event this could not, we think, be a good reason for eliminating a profit element. Profit is a normal element in a reasonable charge. The landlord has the ultimate responsibility and it is fair that he should have some profit to compensate for this. Moreover, the sums expended in providing the services could if not so expended be profitably employed in some other direction. Had the Act otherwise intended we think that it would have used words based on "cost" instead of the words "reasonable charge."

Nor could the fact that the increase in rent under the Act was substantial be a good reason. The permitted rent was still a controlled rent far lower than the economic rent which the flats could command. There is nothing in the Act to suggest an intention that permitted increases or the fact that a landlord was not running at a loss should affect the amount of "a reasonable "charge."

Each case must depend on its own circumstances. But holding, as we do, that prima facie some profit should be allowed in a reasonable charge, we see nothing in the facts of this case to justify the court in not allowing some profit on services other than those of the maintenance company. We can envisage unusual circumstances in which it would be proper to disallow any profit in computing a reasonable charge, e.g., when owing to uneconomical management the addition of a profit margin makes the resulting charge higher than is reasonable. But there is no such suggestion in this case.

A convenient method of allowing a profit is by allowing a percentage on the overall costs. What percentage would be a fair one in this particular case? Many considerations apply in deciding such a point. Though one naturally wishes to encourage landlords to provide services, it must be remembered in this case that the services are a subsidiary activity of landlords and have for them the collateral advantage of making their property attractive. In this aspect the landlords are in a wholly different position from a company whose main activity is in providing services, not to their own tenants, but to the public at large, and whose commercial raison d'être is based on profit derived from that source. We think that in the computation of a reasonable charge in this case there should be allowed to the landlords a 5 per cent. profit (simple interest basis) on all items other than the item of maintenance by their subsidiary company and the item of depreciation on boilers, hot water service, lift and electrical wiring and fittings for use in the passages. We wish to emphasize strongly that the figure we have allowed for profit in this case is one that seems to us in our discretion, and purely as a question of fact, to be a fair figure in the particular circumstances. We have fixed a figure in order to save the costs of a further hearing before the judge and it is not intended as any guide to what other tribunals should decide in other cases.

It must be remembered that in deciding the appropriate factor or computing what is a reasonable charge a broad approach is necessary. It is impossible to seek to define any hard and fast rules or considerations. The most for which one can hope is an approximate estimate of what is fair and reasonable in the particular case. Too much precision and rigidity is apt to defeat this object. As we have differed from the judge in some matters we should perhaps add that we have been very greatly helped by the full, careful and clear judgment in which he dealt with complicated and difficult problems.

JENKINS L.J. We dismiss the appeal on the "appropriate "factor," and remit the other two matters to the county court in order that the figures, if not agreed between the parties, may be fixed by the county court on the principles stated in our judgment.

Appeal dismissed as to appropriate factor, but allowed on other two points.
Leave to appeal to House of Lords.

Solicitors: *Stikeman & Co.; Graham Page & Co.*

A. W. G.

ISLAND TUG AND BARGE LTD. *v.* S.S. MAKEDONIA (OWNERS).

THE MAKEDONIA.

1957
Dec. 10, 19.

Pilcher J.

Shipping—Salvage—Assessment of awards—Elements material—Tax element—Incidence of taxation on award not material.
Damages—Tax element.
Judicial Precedent—Decision at first instance—Whether binding on other judge.

A company of professional salvors, incorporated in Canada, rendered salvage services to the steamship *Makedonia* on the terms of Lloyd's Standard Form of Salvage Agreement (No Cure—No Pay). Under the terms of this agreement the arbitrator made an award and the salvors then appealed to the appeal arbitrator. The appeal arbitrator increased the award to £60,000 and found that on the profit made, by reason of this award, the salvors under Canadian law would be liable to pay tax amounting to about £18,000. The appeal arbitrator awarded the salvors £75,000 (this sum comprising the award of £60,000 plus an additional £15,000 by way of contribution towards the tax payable on the award) subject to the following question of law, which he stated for the opinion of the court: whether in assessing an award for salvage services rendered by the owners of a salvage vessel the incidence of taxation on any award made should be taken into consideration:—

Held, that, if it was proper to consider the element of taxation in assessing a salvage award in respect of personal services, the same consideration applied in respect of services rendered by the owner of a merchant or salvage vessel; but, that the considerations of taxation applicable to diminish an award of damages in cases of wrongful dismissal or a tortious act, did not justify in the assessment of a salvage award the consideration of the incidence of taxation on such award; accordingly the element of taxation was not one to be taken into consideration in assessing a salvage award.

The Telemachus [1957] P. 47; [1957] 1 All E.R. 72; [1956] 2 Lloyd's Rep. 490 not followed.

British Transport Commission v. *Gourley* [1956] A.C. 185; [1955] 3 All E.R. 796 distinguished.

SPECIAL CASE stated by the appeal arbitrator, Sir Alfred Bucknill, under Lloyd's Standard Form of Salvage Agreement.

The original arbitrator, under the terms of the salvage agreement, awarded the salvors £45,000 and made his award before the decision of Willmer J. in *The Telemachus* [1] had been published. On appeal, the salvors contended that the original award was inadequate for the services rendered, and that the incidence of taxation on the award was an element to be considered in assessing the award. The salvors obtained leave to adduce evidence as to the extent of their liability to pay tax on any award made. The appeal arbitrator stated the following question of law for the decision of the court:

"Whether in assessing the award for salvage services rendered "by the owners of a salvage vessel under Lloyd's Form of Salvage "Agreement (No Cure—No Pay) the arbitrator should take into "account the fact (if it be a fact) that the owners will have to "pay tax on the award."

The appeal arbitrator held that the decision in *The Telemachus* [1] governed the point raised in the special case and continued:

"*The Telemachus* [1] did not decide that all the tax payable by "the contractors should be included in the award, and in my "opinion to do so might impose an unjust hardship on the "respondents. 'Salvage is not governed by the ordinary rules

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[1] [1957] P. 47; [1957] 1 All E.R. 72; [1956] 2 Lloyd's Rep. 490.

" 'which prevail in mercantile transactions on shore. Salvage " 'is governed by a due regard to benefit received, combined with " 'a just regard for the general interest of ships and marine " 'commerce' (Kennedy on Civil Salvage, 2nd ed., p. 8, and "cases therein cited). Salvage includes all expenses properly "incurred by the salvor in the performance of the salvage service: Merchant Shipping Act, 1894, s. 510. But it does not "always follow that the court will make an award high enough to "cover all such expenses (Kennedy, p. 156).

"The liability of the contractors to pay tax on the award is "not, in my opinion, an expense properly incurred in the performance of the service. Assuming that the tax is an incident "which the arbitrator ought to take into account when fixing the "award, it does not stand in a better position than an expense "properly incurred in the performance of the service."

The appeal arbitrator then considered the circumstances of the service and raised the award to £60,000.

With regard to the question of taxation, the appeal arbitrator assumed that under Canadian law the amount of tax would be assessed on the rate ruling when the service terminated, and that the tax payable on the award would be based on the profit made by the salvors out of it and not on the gross award. He then found the following material facts. The total expenses incurred by the salvors, including the maintenance of the salvage vessel, amounted to about £21,000, leaving a profit on the award of about £39,000. The salvors would have to pay tax at the rate of 47 per cent. on the profit under the award, amounting to about £18,000.

Subject to the decision of the court on the question of law the appeal arbitrator awarded the salvors £75,000.

Sir David Cairns Q.C., *S. Knox Cunningham* and *Barry Sheen* for the owners of the salved property. The questions for decision are whether the incidence of taxation on a salvage award should be considered in the assessment of such award, and, if the incidence of taxation is a material element, whether such principle is limited to awards for personal services. Willmer J. decided in *The Telemachus* [2] that the incidence of taxation was a material element in assessing awards for personal services. If this court is of opinion that, with regard to the question of taxation, there is no distinction in principle between the assessment of a personal award and that for a professional salvor, it will then be necessary to consider whether the decision of Willmer J. in *The Telemachus* [2] was correct. The existence of a decision on the point by a judge of equal jurisdiction does not relieve the court of the task of considering the question: *Forster* v. *Baker* [3]; *Green* v. *Berliner* [4]; *Receiver for the Metropolitan Police District* v. *Croydon Corporation.*[5] It is submitted that the decision in *The Telemachus* [6] is limited to awards for personal services. If the principle of that decision applies to the assessment of an award to a professional salvor, then it is submitted that the decision was wrong. It is clear from the report [7] of the argument that the point was taken by the judge. The judge appears to have applied the decision in *British Transport Commission* v. *Gourley.*[8] The decision in that case is limited to circumstances in which the damages awarded in a claim in contract or in tort are not taxable, and the amount, which the plaintiff has been deprived of earning, would have been taxable. Such cases are in no way analogous to a claim in salvage where the award itself is subject to the incidence of taxation. This appeal should be allowed on the ground that the decision in *The Telemachus* [9] does not apply to the case of an award to a professional salvor, and, further, that in any event that decision was wrong. [*The Queen Elizabeth* [10] was also referred to.]

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[2] [1957] P. 47

K. S. Carpmael Q.C. and *Michael Kerr* for the salvors. If the incidence of taxation is an element to be considered in assessing a salvage award for personal services, then a fortiori that same principle must apply in the assessment of an award made to a professional salvor. In *The Telemachus* [11] the judge did not base his decision solely on that in *British Transport Commission* v. *Gourley*,[12] but also on the general principle of the law of salvage, whereby salvors are to be encouraged to render services. It has long been a principle of the law of salvage that professional salvors are to be encouraged and given liberal awards: *The Industry* [13]; *The Glengyle.*[14] Before the decision in *British Transport Commission* v. *Gourley* [15] questions of taxation were considered to be res inter alios acta. Since that decision it appears that taxation is a matter to be considered, and this principle applies to the law of salvage. It is submitted that *The Telemachus* [16] was correctly decided and that the principle of that decision applies to the assessment of an award made to a professional salvor. [*Moorhouse* (*Inspector of Taxes*) v. *Dooland* [17] and *Calvert* (*Inspector of Taxes*) v. *Wainwright* [18] were also referred to.]

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[2] [1957] P. 47.

[3] [1910] 2 K.B. 636; 26 T.L.R. 421.

[4] [1936] 2 K.B. 477; 52 T.L.R. 221; [1936] 1 All E.R. 199.

[5] [1956] 1 W.L.R. 1113.

[6] [1957] P. 47.

[7] Ibid. 48, 49.

[8] [1956] A.C. 185; [1955] 3 All E.R. 796.

[9] [1957] P. 47.

[10] (1949) 82 Ll.L.Rep. 803.

[11] [1957] P. 47.

[12] [1956] A.C. 185.

[13] (1835) 3 Hag.Adm. 203.

[14] [1898] A.C. 519; [1898] P. 97.

[15] [1956] A.C. 185.

Sir David Cairns Q.C. replied.

Cur. adv. vult.

Pilcher J. stated the facts and continued: It seems reasonably clear that the appeal arbitrator dealt with the case in this way: He first considered whether, apart from the incidence of tax, the original arbitrator's award was sufficient, taking into account all the circumstances of the case and all the special considerations, which apply when the service is rendered by a salvage vessel maintained on station for the express purpose of rendering salvage services to vessels in distress. Taking these matters into consideration, he determined that the award was, as he states, "much too little." He accordingly increased it by 25 per cent. to £60,000. It is not now disputed that if questions of tax are to be disregarded, £60,000 is a proper award. It is also common ground that if the argument put forward by the claimants in regard to the tax position is sound, the appeal arbitrator's award of £75,000 is a proper one.

The point which is submitted for the opinion of the court is simply this. Is it proper in law for the court or an arbitrator, when assessing the amount of salvage to be awarded to the owners of a salvage vessel, having taken into account all the elements which have been laid down in countless cases as being matters for consideration, and arrived upon this basis at an appropriate sum, to add to such sum a further sum representing or "on account of" the tax which the salvors, in this case the owners of the salvage vessel, will have to pay under the fiscal laws to which their company is subject, upon the profit shown on the particular service? Put in another way, is there any principle peculiar to the law of salvage which requires or enables the court, upon grounds of public policy, after assessing the award due to a salvor upon generous and well-established principles, to break new ground and further increase his award in such a fashion as to relieve him wholly or substantially from the tax burden upon the profits which he derives from a salvage service?

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[16] [1957] P. 47.

[17] [1955] Ch. 284; [1955] 1 All E.R. 93.

[18] [1947] K.B. 526; [1947] 1 All E.R. 282.

It will be observed that the question propounded by the appeal arbitrator is confined to the case where the salvors are "the "owners of a salvage vessel." I draw attention to this fact because, on December 7, 1956, Willmer J. gave judgment in *The Telemachus.*[1] The original arbitrator had, as I understand it, on December 7, 1956, heard the arbitration in the present case, but had not yet published his award. In *The Telemachus*[1] salvage services were rendered to the *Telemachus* by a sister ship, the *Tantalus*. There was, of course, no claim for salvage by the owners of the *Tantalus*, who were also the owners of the *Telemachus*. But the master and crew of the *Tantalus* put forward a salvage claim. During the course of the argument Willmer J. himself raised the question of tax,[2] asking whether any members of the crew of the *Tantalus* would have to pay tax on any award made. It was not in dispute before him that mariners were liable under the fiscal laws of this country to include in their income for tax purposes any sums received by them in the form of salvage awards. In so far as the matter was material for my purposes, counsel before me were agreed that this was so, apparently on the ground that salvage is a payment for services rendered, and must under the law of this country be regarded as subject to tax, if it derives, as it does when the services are rendered by seamen, from the seamen's service or employment.

To return to *The Telemachus.*[3] During the course of the argument Willmer J. suggested that the principle applied in *British Transport Commission* v. *Gourley*[4] might properly be applied in a case involving personal services for salvage. It is apparent from Willmer J.'s judgment[5] that the judge took the point himself, feeling that there was some principle in the decision in *Gourley's* case[6] which might make it proper for him to take tax into account in arriving at his award in the case before him. In the course of his judgment, having stated the facts, Willmer J. said[7]: "There is, however, I think, one other "matter to be taken into consideration, more especially when

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[1] [1957] P. 47; [1957] 1 All E.R. 72; [1956] 2 Lloyd's Rep. 490.

[2] [1957] P. 47, 48, 49.

[3] [1957] P. 47.

[4] [1956] A.C. 185; [1955] 3 All E.R. 796.

[5] [1957] P. 47, 50.

[6] [1956] A.C. 185.

[7] [1957] P. 47, 49.

"one is dealing with personal awards of this character, and that "is this. Certainly the master of the *Tantalus*, and, I apprehend, "in all probability, all the officers of the *Tantalus*, and, I dare "say, all the European members of her crew, will become liable "to taxation, as part of their earnings, upon such share of my "award as they receive. I raised the question in argument "whether that is an element which ought to be taken into "consideration, and I raised that point more particularly having "regard to the recent decision of the House of Lords in *British* "*Transport Commission* v. *Gourley*.[8] It appears to me that in "principle the same considerations as apply to an award of "damages in favour of an injured plaintiff should properly also "apply to an award of salvage in the case of a plaintiff who has "performed personal services. More particularly I think is that "so when one pays regard to the principles of public policy under-"lying the law relating to salvage awards. In modern conditions "it seems to me that it would be quite unreal, when one is "dealing with personal services, to ignore the possible effect of "taxation upon the amount of the salvage award. If one were "to ignore it, it seems to me that one would be cutting at one "of the root principles on which salvage is awarded, namely, "that of encouragement to mariners to perform services of a "salvage nature. If allowance is not made for the fact of "taxation, it simply means that the reality of the award made "in cases of this sort is so much the less. In those circum-"stances I have thought it right to take that matter into con-"sideration. I have not sought to do so by way of any exact "calculation. I think it must necessarily be dealt with in a "rough and ready way, simply as an element to be considered. "It appears to me that one is in very much the same position "with regard to that as one is in relation to expenses necessarily "incurred in the performance of a salvage service. For many "years that has been regarded as an element which the court "should take into consideration in awarding salvage, and for this "reason, that if one ignores the expense which has to be incurred "in rendering the service one may be left in the position that "the salvage award is no reward at all and no encouragement "to mariners to perform salvage services. It appears to me that "in the case of personal services one ought to pay just the same "regard to the incidence of taxation as, in the case of other "services, one pays to the incidence of expenses necessarily

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[8] [1956] A.C. 185.

"incurred. In the award which I propose to make, therefore, "I think it is right to say that in the case of the master and in "the case of such proportion of the crew as are of European "extraction, I have thought the liability to taxation is an element "to be taken into consideration. Moreover, I will go further and "say that the awards I am about to pronounce are larger than "they would have been if I had come to the conclusion that the "tax element was to be wholly disregarded."

I have thought it right to read virtually the whole of Willmer J.'s judgment on this point because counsel for the respondents, in opening the case, made two submissions to me. He submitted, in the first place, that Willmer J.'s decision in *The Telemachus* [9] was wrong; and, secondly, that, in any event, the principle of that decision should be confined to claims for personal services by members of the crew of a salving ship, and should not extend to the case where the services were rendered by professional salvors.

Counsel for the respondents submitted—and submitted rightly, in my view—that if I took the view that Willmer J.'s decision was wrong, and was not distinguishable from the present case, I was not bound to follow it. The cases on this point are conveniently collected and reviewed by Slade J. in *Metropolitan Police District Receiver* v. *Croydon Corporation.*[10] Slade J. refers to a passage from the judgment of Lord Goddard in *Huddersfield Police Authority* v. *Watson*[11]: "We are considering a decision of this court. So far as the dictum of "Grove J.[12] is concerned, I can only say for myself that I think "that the modern practice, and the modern view of the subject, "is that a judge of first instance, though he would always follow "the decision of another judge of first instance, unless he is "convinced the judgment is wrong, would follow it as a matter "of judicial comity. He certainly is not bound to follow the "decisions of a judge of equal jurisdiction. He is only bound "to follow the decisions which are binding on him, which, in "the case of a judge of first instance, are the decisions of the "Court of Appeal, the House of Lords and the Divisional Court."

I accordingly approach the matter upon the basis that, unless in my view the case before me can be distinguished on the facts or in principle from *The Telemachus*,[13] I am not bound to follow the principle applied by Willmer J. in *The Telemachus* [14] in answering the question of law propounded to me by the appeal arbitrator.

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[9] [1957] P. 47.

[10] [1956] 1 W.L.R. 1113, 1116; [1956] 2 All E.R. 785.

[11] [1947] K.B. 842, 848; 63 T.L.R. 415; [1947] 2 All E.R. 193.

[12] (1884) 53 L.J.Q.B. 335.

[13] [1957] P. 47.

In *The Telemachus* [15] Willmer J. decided that he ought to take questions of tax into consideration, but was careful to confine his observation to the case before him, where the claims were, as he expressed it, for " personal services " by the master and crew of the *Tantalus*.

The first matter, therefore, which I have to consider is whether the fact that the services in the present case, which were rendered by a salvage vessel maintained on station for the express purposes of rendering salvage services and owned by a company whose principal business was that of professional salvors, suffices factually or in principle to distinguish *The Telemachus* [16] from the case before me.

In the days of sail, salvage services were generally of a personal character, and only those who actually rendered the services were entitled to claim. I may perhaps refer to a well-known passage in the judgment of Lord Stowell in *The Vine* [17]: " It is, I apprehend, a general rule that a party, not actually " occupied in effecting a salvage service, is not entitled to share " in a salvage remuneration. The exception to this rule that " not unfrequently occurs is in favour of owners of vessels, which, " in rendering assistance, have either been diverted from their " proper employment, or have experienced a special mischief, " occasioning to the owners some inconvenience and loss, for " which an equitable compensation may reasonably be claimed." Now that passage is set out on page 74 of the late Lord Justice Kennedy's book on the Law of Civil Salvage in the second edition, and the quotation is followed by these words, which I read from the book: " The right of the owner of the salving " vessel to be rewarded as a salvor has received, especially in " recent times, liberal recognition from the Court of Admiralty. " Where the salving vessel is a steamship and is herself the chief " instrument in the service, as now is commonly the case, it is " the owner who gets the principal share in the reward. Even " where the salvage has been performed entirely by the personal " exertions of the crew of his vessel, he is usually held to be " entitled to some, but, of course, to a smaller share."

With the advent of steam, when the steam vessel was herself the chief instrument in the service, it became recognized that the owner of the salving vessel, although not present at the time, was entitled to the principal share in the reward—as appears from the passage which I have read—inasmuch as his property had been put at risk, and had moreover been primarily instrumental in effecting the service.

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[14] [1957] P. 47.

[15] Ibid.

[16] Ibid.

[17] (1825) 2 Hag.Adm. 1, 2.

It is, I think, common knowledge that for some 60 years or more companies incorporated in various countries, and whose names are household words in the shipping community, have carried on the business of professional salvors, maintaining salvage vessels and salvage equipment at strategic points. Such companies employ highly skilled personnel, and it has been recognized by the courts of this country, at least since the year 1898, when *The Glengyle*[18] was decided, that services rendered by salvage vessels of this character are deserving of and should receive a particularly generous award. Great stress was laid upon this point by counsel for the claimants, and accordingly I propose to read two or three short passages from the judgments in *The Glengyle*.[19] The passage which I want to read is the judgment of Gorell Barnes J. in the Admiralty Court[20]: "Lord "Stowell said, in *The William Beckford*[21]: 'The principles upon "'which the Court of Admiralty proceeds, lead to a liberal "'remuneration in salvage cases; for they look not merely to "'the exact quantum of service performed in the case itself, but "'to the general interests of the navigation and commerce of "'the country, which are greatly protected by exertions of this "'nature.' These principles have been emphasised in many "cases by different judges of the Admiralty Court. The remarks "of Sir Charles Butt in *The Envoy*,[22] in a case of salvage services "rendered by steam-tugs, are very appropriate to the present "case. He said: 'To my mind, one of the most important "'functions of this court is to encourage the maintenance of "'powerful and efficient steam-tugs around our coasts, to be in "'constant readiness to assist vessels in distress. Not only in "'the course of the year is a large amount of property saved by "'these means, but a considerable sacrifice of life is prevented. "'Therefore, the principle we go upon is not that of a quantum "'meruit, but of giving such an award as will encourage people "'to keep vessels of adequate size and dimensions ready to go "'out.'" Then he turns to the facts of *The Glengyle*[23] and says: " The maintenance and establishment of salvage steamers " such as the *Hermes* and the *Newa* are for the general benefit " of owners and underwriters and others interested in seagoing " vessels and their cargoes, and the crews and passengers of " such vessels, and, guided by the principles above stated, the " Admiralty Court will be liberal in its awards in respect of " services rendered by salvage steamers, even though the awards " may fall somewhat heavily on individual owners.

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[18] [1898] P. 97.

[19] Ibid.

[20] Ibid. 102.

[21] (1801) 3 C.Rob. 355.

[22] Unreported. See Kennedy, The Law of Civil Salvage, 3rd ed., pp. 149 and 150.

[23] [1898] P. 97, 102.

" The owners of salvage steamers invest a large amount of " capital in them, and maintain them and their crews, divers, " and appliances at great expense, and have no remuneration to " look forward to except that which may be earned by occasional " salvage services."

Then the case is reported in the Court of Appeal and A. L. Smith L.J. says[24]: " What is the amount the plaintiffs are " entitled to recover? If this had been an ordinary salvage case, " either by tugs or by a passing ship, for myself I think that the " run of the authorities shew that this sum of £19,000 would be " excessive. Counsel for the appellants have referred to a large " body of cases, in only one of which—*The Thetis*[25]—so large an " amount has been given. But there is this material difference " in this case, namely, that these two large salving vessels are " kept at a very high expense for the purpose of salving ships; " and one cannot shut one's eyes to this fact, that unless those " ships had been kept where they were ready to proceed at once " to sea, the owners of the *Glengyle* and of her cargo would have " lost £76,596. Taking that into consideration as one factor in " the case, as also the risks which the salving vessels and their " crews ran, I cannot say that the sum of £19,000 which has " been awarded by my brother Gorell Barnes is so excessive " that this court ought to set it aside." I have only read those passages from the judgments in *The Glengyle*[26] because they were stressed, and properly stressed, by Mr. Carpmael on behalf of the claimants. They state a principle which is well known in the Admiralty Court, and well known to arbitrators who have to deal with salvage by arbitration, and it is always applied.

Proceeding, therefore, on the basis, and recognizing, that the claimants in the present case, who were professional salvors, had to have a particularly generous award, I bear in mind that they employ experienced service personnel, and it is well known, although it is not stated by the appeal arbitrator in this case, that professional salvors who keep salvage tugs on station have special arrangements which they make for the remuneration of the master and crew of those salvage vessels. But it is unusual, where a professional salvor is a plaintiff in an action or a claimant in an arbitration, for the master and crew of the salvage vessel involved to figure personally as plaintiffs or claimants. The award made, however, in every salvage case is in a sense a reward for personal services. The element of risk to the salving crew is the same whether they are on board a merchant ship or a salvage vessel. The responsibilities undertaken by the master of the salving craft is the same whatever its nature. The danger to the salved vessel does not differ whether the salvor is a merchant ship or a salvage vessel. All these are matters which are crucial when the amount of the salvage award has to be considered.

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[24] [1898] P. 97, 110.

[25] (1834) 2 Knapp 390.

[26] [1898] P. 97.

Having given the matter the most careful consideration, I find it quite impossible to distinguish *The Telemachus* [27] from the case now before me, either on its facts or in principle. But for the fact that, in *The Telemachus*,[28] the salving and the salved vessel were in the same ownership, the owners of the *Tantalus* would have figured with her master and crew as plaintiffs. If the incidence of personal taxation is to be taken into account when the claimants are individuals who have actually taken part in this service, it is difficult to see why the same concession should not be made to the owner of a ship, where he is an individual, whose property has been put at risk if his ship has been instrumental in performing the service. If the principle applies to a ship owned by an individual, then why should the same concession be refused to a ship owned by a corporation? If it applies to a merchant ship owned by a corporation, then why should it not apply to a salvage ship similarly owned?

Finding it impossible to distinguish between *The Telemachus* [29] and the case before me, either on the facts or in principle, I have to consider the submission made to me on behalf of the respondents that Willmer J. was wrong in law in taking into account, when he arrived at his award, the fact that the master and certain members of the crew of the *Tantalus* would have to pay tax on the sums awarded to them.

It is quite clear that Willmer J. decided that, when personal salvage services are in question, the incidence of taxation should be taken into account because of the recent decision of the House of Lords in *British Transport Commission* v. *Gourley*.[30]

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[27] [1957] P. 47.

[28] Ibid.

[29] Ibid.

[30] [1956] A.C. 185.

The appeal arbitrator, who clearly took the same view as I do myself, namely, that it was impossible to distinguish *The Telemachus* [31] from the present case, held himself bound by Willmer J.'s decision in *The Telemachus*.[32]

It is probably safe to say that, in spite of the very high rate at which individuals and companies have now been taxed for many years, it would never have occurred to anyone that salvors, personal, mercantile or professional, should, under any principle attaching to the law of salvage, be entitled to off-load all or some of their liability to tax onto the shoulders of the owners of the salved property. Does any principle laid down in *Gourley's* case [33] require that this should be so? I recognize to the full that one of the reasons for awarding salvage services on a liberal scale is so as to encourage mariners to assist vessels in distress, and that this principle applies with particular force when professional salvors are concerned. It is, moreover, inevitable that the salvor may feel correspondingly discouraged when he finds that he has to pay tax at the appropriate rate on the profit element in the sum awarded to him. This, however, so far as I am aware, has always been the position.

Does any principle laid down in *Gourley's* case [34] support the view expressed by Willmer J. in *The Telemachus*? [35] If I may express my own humble opinion, *Gourley's* case [36] decides no more than this, namely, that in awarding damages for incapacity due to injury caused by the tortious act of another, such damages not being subject to tax, the court should have regard, not to the gross sum which the injured person has been prevented from earning during the period of his incapacity, but to the net amount which would have remained in his hands after he had paid tax at the appropriate rate during such period. The same principle has been applied since *Gourley's* case [37] in a case of wrongful dismissal, when the plaintiff's case was founded on breach of contract.

So far as I am aware, all cases, whether founded on tort or in contract, in which the incidence of taxation has been taken into account, have been cases in which the sum awarded by the court would not have been subject to tax. In all such cases consideration of the tax aspect has led the court to reduce the sum payable by way of damages or compensation by the amount which the plaintiff would have had to pay away in tax if he had not been the victim of the tort or breach of contract in respect of which his action is brought. *Gourley's* case [38] was founded on tort. Lord Reid says [39]: "The general principle on which "damages are assessed is not in doubt. A successful plaintiff "is entitled to have awarded to him such a sum as will, so far "as possible, make good to him the financial loss which he has "suffered and will probably suffer as a result of the wrong done "to him for which the defendant is responsible. It is sometimes "said that he is entitled to restitutio in integrum, but I do not "think that that is a very accurate or helpful way of stating his "right. He cannot in any real sense be restored, even financially, "to his position before the accident. If he had not been injured "he would have had the prospect of earning a continuing income, "it may be, for many years, but there can be no certainty as to "what would have happened." Then he concludes at the end of the paragraph as follows: "Yet damages must be assessed as a "lump sum once and for all, not only in respect of loss accrued "before the trial, but also in respect of prospective loss. Such "damages can only be an estimate, often a very rough estimate, "of the present value of his prospective loss." Lord Reid is there stating the well-known principle upon which damages in tort are assessed in cases of personal injury. The respondent in *Gourley's* case [40] was awarded an approximation of the net sum which he would have retained, after paying tax at a high rate, had he not been incapacitated.

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[31] [1957] P. 47.
[32] Ibid.
[33] [1956] A.C. 185.
[34] Ibid.
[35] [1957] P. 47.
[36] [1956] A.C. 185.
[37] Ibid.

The following distinctions between *Gourley's* case [41] and the one with which I am concerned spring at once to the eye. Damages in tort and for breach of contract are not subject to tax, whereas salvage awards, or at least such profit element as they may contain, attract tax. In *Gourley's* case [42] the sum awarded was reduced by the introduction of tax considerations. In the present case it is sought to increase the award by bringing tax into consideration.

The claimants in the case before me are a company incorporated under the law of Canada. Their main revenue, as I understand it, is derived from salvage awards earned by the skilful use of the salvage vessels and gear which they own. They are a business concern like any other business concern, whose object is to make profits. Whilst the work they perform is no doubt admirable and to be encouraged, they are not a charity. The company is subject to the fiscal laws of its country of incorporation or its residence, and for my part I can see no principle laid down in the speeches of the majority of the noble Lords in *Gourley's* case[43] which justifies the introduction into the ancient law of salvage of so startling and important an element as is contended for by the claimants in the present case, and was held by Willmer J. to be present in *The Telemachus*.[44]

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[38] [1956] A.C. 185.

[39] Ibid. 212.

[40] [1956] A.C. 185.

[41] Ibid.

[42] Ibid.

It is not, I gather, in dispute that in increasing the award of the original arbitrator from £45,000 to £60,000 the appeal arbitrator took into account all the elements which it was proper to consider upon the decided cases, including the fact that the claimants, as professional salvors, were entitled to particularly generous treatment. Having done this, and feeling himself bound by the decision of Willmer J. in *The Telemachus*,[45] he added £15,000 to his award to recompense the claimants for the £18,000 which they would have to pay away in tax. He thus "took the "tax aspect into account" in much the same way as the court and arbitrator "take into account" in arriving at salvage awards the proved expenses of salvors incurred in rendering the salvage services. This is what Willmer J. said he was doing in *The Telemachus*,[46] although he did not indicate to what extent the awards he made had been increased by consideration of the tax position of the salvors.

I need not say that it is only after the most anxious thought and careful consideration that I have felt compelled to disagree with the views on this topic expressed by Willmer J. in *The Telemachus*.[47] I do not feel, as he did, that any principle laid down in *Gourley's* case[48] compels, or even inclines, me to take the view that a salvor, who is already generously rewarded on well-known principles, should have his award further increased so as to indemnify him wholly or in part for the fact that the fiscal law to which he is subject requires him to pay tax on the profit element in his salvage award. If it is right that awards made to salvors, which are already assessed on generous lines, should be exempted in whole or in part from liability to tax, this seems to me to be a matter for consideration by the legislature. In my humble opinion, it is not the business of the court to defeat or mitigate the effect of the fiscal laws of this or any other country, more especially where this can only be done at the expense of the owners of the salved property.

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[43] [1956] A.C. 185.

[44] [1957] P. 47.

[45] Ibid.

[46] Ibid.

[47] Ibid.

[48] [1956] A.C. 185.

For these reasons, I regretfully find myself unable to agree with the judgment of Willmer J. in *The Telemachus.*[49] Unlike the appeal arbitrator, I am not bound by his judgment. I accordingly direct that the order made by the appeal arbitrator in paragraph 14 (2) * of his award shall take effect, and that the claimants will pay to the respondents the costs of the argument of the special case before me.

Appeal allowed.

Solicitors: *Constant & Constant; Ince, Roscoe, Wilson & Griggs.*

A. S-R.

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[49] [1957] P. 47.

* Under paragraph 14 (2) of the award, in the event of the court holding that the incidence of taxation was not a material element, the appeal arbitrator awarded the salvors £60,000 with interest and directed that the owners of the salved property pay the costs of the hearing before him.

1958
Jan. 20, 22.

Diplock J.

UNION-CASTLE MAIL STEAMSHIP CO. LTD. *v.* UNITED KINGDOM MUTUAL WAR RISKS ASSOCIATION LTD.

[1957 U. No. 804.]

Insurance—Marine—War risks—"Prolongation of voyage"—Admiralty advice to shipping to avoid Suez Canal area—"Direction"—"Approval"—Calls made at unscheduled ports—Liability of insurers under policy.

Ships' names—Dunnottar Castle—Rhodesia Castle.

The plaintiff shipowners insured two of their vessels, the *Dunnottar Castle* and the *Rhodesia Castle,* cargo and passenger liners, under the 1955–57 Standard Form of War Risks Time Policy on Hull and Machinery issued by the defendants. By clause 1 of the policies: "1. This insurance is only to cover the following . . . "(F) Expenses incurred by the assured by reason of: (1) the detention of the insured ship in pursuance of the orders or directions "or with the approval of the committee or of any British Government department or official or British military authority given "in order to avoid loss of or damage to the insured ship by any "peril hereby insured; (2) prolongation of the voyage arising out "of compliance with such orders or directions, or with such "approval as aforesaid"; and there was a franchise whereby "Nothing shall be payable in respect of the first seven days of each "such period of detention or prolongation. . . ."

The *Dunnottar Castle* sailed from London on October 17, 1956, on a scheduled round-Africa voyage in a clockwise direction and was due to return to London on December 21. The *Rhodesia Castle* sailed from London on September 26 on a scheduled round-Africa voyage in an anti-clockwise direction and was due to arrive back on December 1.

On October 30, 1956, the Admiralty issued the following statement: "In view of the situation between Israel and Egypt, "merchant shipping is advised, for the time being and until further "notice, to keep clear of the Suez Canal and Egyptian and Israeli "waters." The plaintiffs ordered the *Dunnottar Castle*, then at Port Said, to turn round and sail back by the Cape, and the *Rhodesia Castle*, which was at Beira on October 30 and due to proceed to Mombasa and Port Sudan (which was outside the area covered by the Admiralty order), to turn round at Mombasa and go back via the Cape and Mediterranean ports. The plaintiffs notified the defendants of the diversions and the defendants acknowledged the information, but made no comment. The plaintiffs did not seek any approval of their instructions to the masters of the vessels, but had they asked the committee the committee would in fact have approved them. The *Dunnottar Castle* reached London on January 10, 1957, and the *Rhodesia Castle* on December 11, 1956. In the event calls were made by both vessels at unscheduled ports, some of the scheduled ports were not called at, and additional passengers were taken on and carried in a reverse direction to the scheduled voyages of the vessels.

On a claim by the plaintiffs under the policies:—

Held, (1) that in the context of clause 1 (1) (F) the word "directions" did not include advice, warnings, recommendations or authoritative guidance the ignoring of which gave rise to no sanctions, and that, accordingly, the Admiralty warning of October 30, 1956, was not an order or direction of any British Government department within the meaning of the clause.

(2) That the plaintiffs were entitled to rely upon the Admiralty warning as constituting "approval" by a British Government department of such of the steps taken by them as were taken to heed the advice contained in the warning.

(3) That there had been no "approval," express or implied, by the defendants' committee within the meaning of the policy; the fact that the committee would have approved if asked could not amount to implied approval when none in fact was sought; nor could the committee's failure to raise objections give rise to any estoppel, for there was no duty upon them to speak.

(4) That, while in turning the *Dunnottar Castle* back out of the area covered by the warning the plaintiffs were acting with the approval of the Admiralty (and it mattered not if their motives in so doing were mixed), the turning round of the *Rhodesia Castle*

at Mombasa and the failure to allow her to proceed to Port Sudan as scheduled were not steps taken in compliance with the Admiralty warning.

(5) That if the result of keeping away from the defined area necessarily caused a deviation which prolonged the length of the voyage, expenses incurred as a result of that prolongation would be recoverable under the policy, but that the peril insured against was a prolongation of "the voyage"—namely, the voyage on which the vessel was engaged at the moment when the steps were taken with the approval of the Admiralty—and the movements of each of the two vessels after turning back could not be considered as a continuation of their original voyages; that although a minor variation in the order of calling at scheduled ports would not necessarily amount to a change of voyage, the calls at a number of unscheduled ports, the carrying of passengers in the reverse direction from that of the scheduled voyage, and the omission to call at scheduled ports, however sensible commercially, amounted to a new or changed voyage and not to a prolongation of the voyage within the meaning of the policy; accordingly, the plaintiffs were not entitled to recover under the policies.

Per curiam (obiter). "Prolongation" in the policy is used in a temporal sense and does not start until the date on which the voyage would normally have ended, and there may be deviation without prolongation. It is the actual expenses incurred during prolongation of the voyage after the expiry of the first seven days which are recoverable; additional expenses incurred during the first seven days are irrelevant and neither savings in those days nor benefits accruing as a result of the prolongation should be taken into account in assessing a claim under the policy.

ACTION.

The plaintiffs, the Union-Castle Mail Steamship Co. Ltd., the owners of the *Dunnottar Castle* and the *Rhodesia Castle*, were members of the defendant association, the United Kingdom Mutual War Risks Association Ltd. By two policies dated November 3, 1956, in the form of the "1956–57 Standard "Form of War Risks Time Policy on Hull and Machinery" the defendants agreed to insure the plaintiffs and the *Dunnottar Castle* and the *Rhodesia Castle* against the risks set out in the policies from February 20, 1956, until February 20, 1957.

Clause 1 of the policies provided as follows: "1. This "insurance is only to cover the following, namely: . . . (F) "Expenses incurred by the assured by reason of: (1) the detention of the insured ship in pursuance of the orders or directions or with the approval of the committee or of any British "Government department or official or British military authority "given in order to avoid loss of or damage to the insured ship "by any peril hereby insured; (2) prolongation of the voyage "arising out of compliance with such orders or directions, or "with such approval as aforesaid; . . . Nothing shall be payable in respect of the first seven days of each such period of "detention or prolongation and the amount recoverable shall be "assessed by the committee whose decision shall in all respects "be final."

Clause 2 of the policies incorporated the rules of the association and clause 5 contained, inter alia, a warranty to comply with "orders" given by or on behalf of the Government, "directions" given by the association, and certain "orders, "directions and recommendations" of the committee. Rule 10 of the association's rules required each member to comply with "all orders, directions and recommendations" of the committee.

During September, 1956, tension arose in the area of the Middle East and the Suez Canal and on September 13, 1956, the defendants' directors ("the committee") passed a resolution authorizing "the managers, in the event that any department "of H.M. Government recommends that ships shall not pass "through the Suez Canal, to direct all members accordingly and "to notify them that failure to comply with such direction will "be considered as a breach of warranty under clause 5 of the "association's policy."

On September 26 the *Rhodesia Castle* sailed from London on a scheduled round-Africa voyage in an anti-clockwise direction, being due to return to London on December 1. On October 17 the *Dunnottar Castle* sailed from London on a similar voyage in a clockwise direction and was due to return to London on December 21. On October 29 hostilities between Israel and Egypt broke out, and on October 30 the British and French Governments gave an ultimatum to the Israeli and Egyptian Governments. At 4.30 p.m. on October 30, 1956, the Board of Admiralty issued the following statement: "In view of the "situation between Israel and Egypt, merchant shipping is "advised, for the time being and until further notice, to keep "clear of the Suez Canal and Egyptian and Israeli waters."

At the time when that statement was issued the *Dunnottar Castle* was at Port Said, whence she was due to leave for Suez, while the *Rhodesia Castle* was at Beira, being scheduled to call at Mombasa on November 4 and to proceed from there to Port Sudan. The plaintiffs immediately cabled to the captain of the *Dunnottar Castle* not to proceed further but to await further instructions. On the following day, November 1, it was announced that the Suez Canal had been blocked, and it remained blocked for many months thereafter. On November 2 the plaintiffs instructed the *Dunnottar Castle* to sail forthwith and proceed via the Cape; on the same day they ordered the *Rhodesia Castle* to turn at Mombasa and to take passengers booked for the *Dunnottar Castle* to Beira-Capetown and to return via Cape and Mediterranean ports. In the result both vessels made calls at unscheduled ports, omitted to call at some scheduled ports, took on additional freight, and some additional passengers were embarked and carried in a reverse direction to the scheduled voyages. The *Rhodesia Castle* reached London on December 11, 1956, 10 days later than her scheduled date, and the *Dunnottar Castle* on January 10, 1957, 20 days later than scheduled. The plaintiffs informed the defendants of the diversions and in each case the defendants acknowledged the information without comment. The plaintiffs did not seek approval of their instructions to the masters of the vessels, but had they asked the committee the committee would in fact have approved them.

The plaintiffs contended that in the circumstances of the then existing political and military situation the Admiralty warning of October 30, 1956, was an order or direction given by a British Government department and that any alterations in the proposed itineraries of merchant vessels made in order to leave or avoid the areas referred to and resulting in prolongation of the voyages of the vessels were or resulted in prolongations of the voyages of such vessels arising out of compliance with an order or direction or with the approval of the Admiralty within the terms of clause 1 (1) (F) of the policies, and that, accordingly, the voyage of the *Dunnottar Castle* was prolonged for 20 days (13 days after allowing for the franchise) and that of the *Rhodesia Castle* for 10 days (three days after allowing for the franchise) within the clause; alternatively, that the voyages were prolonged in that the vessels were diverted from their intended voyages on or about November 2, 1956. They also contended that such prolongations of the voyages were made with the approval of the defendants' committee within the terms of clause 1 (1) (F) of the policies. The plaintiffs claimed, inter alia, declarations that the defendants were liable to pay to them under the policies all expenses incurred by them in connexion with the voyage of the *Dunnottar Castle* from December 29, 1956, to January 10, 1957, inclusive, and a similar declaration in respect of the expenses incurred in connexion with the voyage of the *Rhodesia Castle* from December 9 to 11 inclusive; or alternatively, all the expenses incurred by them by reason of the diversion of the vessels from their intended voyages, other than the expenses incurred during the first seven days of the diversions. They sought further declarations that they were not obliged to give credit to the defendants in respect of any savings effected or benefits incurred by them in connexion with the voyages actually performed as contrasted with the intended voyages of the vessels; alternatively, that they were only obliged to give credit to the extent of any such savings or benefits as might have been effected or obtained from December 29, 1956, to January 10, 1957, in respect of the *Dunnottar Castle*, and from December 9 to 11, 1956, in respect of the *Rhodesia Castle*.

The defendants denied that the plaintiffs were entitled to the relief claimed. They contended, inter alia, that the Admiralty statement was not an order or direction within the terms of clause 1 (1) (F) of the policy and that no alteration made in the proposed itineraries of the vessels resulting in prolongations of the voyages arose out of compliance with such order or direction or with "approval" within the policies; also that, as the Suez Canal was blocked, the vessels could not have performed their scheduled voyages; alternatively, that the scheduled voyages became impossible of performance and/or were abandoned by the plaintiffs. They further contended that if the plaintiffs were entitled to recover any sums under the policies such sums did not exceed the actual expenses, less savings, or alternatively the actual expenses incurred by the vessels in getting away from or keeping clear of the Suez Canal and Egyptian and Israeli waters, and did not include expenses incurred during the first seven days in which the vessels were so engaged; and that, if the plaintiffs were entitled to be paid the expenses incurred by them beyond the first seven days in respect of the difference in time between the scheduled and the actual voyages of the vessels, they were entitled to no more than the difference between the estimated expenses of the scheduled voyages and the actual expenses of the actual voyages, less the actual expenses incurred by them during the first seven days after the vessels departed from their scheduled itineraries and less any additional savings incurred in proceeding to and from and in calling at ports not included in the scheduled voyages.

The facts are more fully stated in the judgment.

A. A. Mocatta Q.C. and *Michael Kerr* for the plaintiffs. The Admiralty statement of October 30, 1956, is within the expression "orders or directions . . . of any British Government department" in clause 1 (F) (1) and (2) of the policy. In particular, reliance is placed on the word "directions." The Oxford English Dictionary, vol. 3, p. 391, col. 1, defines "direction" as, inter alia, "1. The action or function of directing: . . . c. of instructing "how to proceed or act aright; authoritative guidance, instruc-"tion." The Admiralty statement was clearly "authoritative "guidance" to shipping. "Orders" contemplates sanctions, and the use of the word "directions" in contrast to "orders" shows that it is intended to refer to a guidance or instruction which has no sanction behind it. "Directions" in clause 1 (F) (1) and (2) is also wide enough to cover recommendations; the fact that "recommendations" is used in rule 10 does not mean that it is to be excluded from clause 1 (F) (1). The policy is a standard form of war risks policy issued by the defendants, and if there is any ambiguity it should be construed contra proferentum.

Alternatively, the action taken by the plaintiffs to divert their ships was taken with the "approval" of the Admiralty within the meaning of the clause. The clause contains no express requirement for the submission of a proposed course of action and the obtaining of express approval, but in view of the terms of the Admiralty statement, any action designed to keep British ships out of Egyptian hands had the approval of the Admiralty. Similarly, the plaintiffs' course of action had the approval of the defendants' committee. It has been conceded that, if asked, the committee would have approved; if every shipowner was required to obtain express approval from the committee before taking any steps to divert ships in such circumstances, there would be delay and confusion leading to a possible loss of ships.

The diversion of both the ships and the prolongation of their voyages arose out of "compliance" with the Admiralty orders or directions; that is clear on the facts so far as the *Dunnottar Castle* is concerned; so far as the *Rhodesia Castle* is concerned, it is immaterial if the prolongation of her voyage was also due to the blockage of the Suez Canal, for it is sufficient if a cause of the prolongation was compliance with the Admiralty statement.

There can be no question of abandonment or of frustration of the voyages. The plaintiffs did their utmost to keep to the original schedule and nearly did so, although the vessels had to sail farther and take considerably longer than scheduled. It cannot be said, therefore, that the words "prolongation of the "voyage arising out of compliance with such orders or directions, "or with such approval" in clause 1 (F) (2) do not apply: contrast the expression "resulting from" used in clause 1 (E), which is more exclusive an expression than "arising out of."

As to the calculation of expenses, the plaintiffs are entitled to recover all the expenses resulting from the prolongation, except those relating to the first seven days. Any port charges incurred during the first seven days of the prolongation should be excluded, but port charges incurred after those seven days are recoverable. Savings to the plaintiffs during the prolongation are immaterial. The policy is not against loss of profits or on freight but covers "expenses incurred" by reason of the prolongation of the voyage; it is not, therefore, concerned with what would, but for the prolongation, have been expended. In any event, no credit can be claimed for savings during the first seven days of the prolongation. Similar considerations apply to benefits.

Eustace Roskill Q.C. and *Stephen Terrell* for the defendants. In construing the policy it must be borne in mind that it is primarily a hull and machinery policy against loss or damage on which the provision in question—in reality an enhanced sue and labour provision—has been superimposed. By clause 1 (F) (1) and (2) the assured is only entitled to recover expenses incurred by reason of a prolongation of a voyage when the prolongation has been ordered, directed or approved by the committee or by a British Government department, and the order, direction or approval was given in order to avoid a loss. Here there was no such order, direction or approval, compliance with which gave rise to a prolongation of the voyage of either of the plaintiffs' vessels. The plaintiffs' action in changing the programme of their vessels was in fact caused by their own decision, prompted by the impossibility of performance of the scheduled voyages either because of the general situation or because of the blocking of the Suez Canal. The scheduled voyage was in each case described as a round-Africa voyage via Suez, and it was that voyage which became impossible of performance; in each case the voyage on which the vessel subsequently sailed was a different or changed voyage. The result may have been in conformity with the Admiralty warning, but that does not mean that there was any causal connexion between it and the voyage of the vessels round the Cape.

To come within clause 1 (F) (2), the order, direction or approval must operate so as to be the cause of the whole of the prolongation, but the course of action taken by the plaintiffs was not a matter on which any order, direction or approval of the Admiralty operated. The Admiralty was concerned only that vessels should keep away from danger, not with their voyages in lieu of the intended voyages, and, once a vessel had gone outside the area covered by the warning, the connexion between the diversion and the warning ceased.

The Admiralty warning was not an order or direction within the meaning of clause 1 (F) (1) and (2). " Orders or directions " necessarily contemplates some form of legal sanction or power to order or direct, as was given to many Government departments and officials by the Emergency Legislation during the last war. By 1956 the Admiralty had no power to give orders or directions to merchant shipping and therefore the warning was issued as an advice. Nor can the Admiralty be deemed to have approved the plaintiffs' course of action; there is nothing to suggest that the Admiralty had any knowledge of the instructions given by the plaintiffs to the masters of the vessels, and it is not enough to say that approval would have been given had it been sought. The Admiralty was merely concerned with warning—it was not its function to approve.

The plaintiffs cannot rely on the " approval " of the committee. In order to do so they must show a course of action which has been approved, with knowledge, by the committee. In any event it was not within the power of the committee to approve the voyages of the vessels round the Cape. The committee's resolution of September 13, 1956, was merely a preliminary step towards obtaining powers to give directions, failure to comply with which would give rise to a breach of warranty under clause 5 of the policy, and is immaterial to the present issue.

This is a contract of indemnity and under it the plaintiffs are only entitled to be put in the same position as they would have been had there been no peril. They can therefore only recover their actual loss, that is, any extra expenses incurred by them not recouped by other means. Accordingly, in addition to deducting the expenses of the first seven days of any prolongation, they must give credit for savings and benefits. Otherwise, the prolongation might result in a profit, which would be contrary to the principle underlying a contract of indemnity.

A. A. Mocatta Q.C. in reply. The policy contemplates not only a state of actual war but also of civil strife, and clause 1 (F) (1) and (2) should not be construed by reference to the technical meaning given to the words " orders and directions " during the last war. " Prolongation " under the clause does not start until the duration of the scheduled voyage has been exceeded, and it is the first seven days after that date which are excepted by the franchise. Questions of profit are irrelevant to any calculation of the amount recoverable under the policy.

Cur. adv. vult.

January 22. DIPLOCK J. read the following judgment: In respect of the year February 20, 1956, to February 20, 1957, the defendants, a mutual insurance association, issued to their members, of whom the plaintiff company is one, a standard form of War Risks Time Policy upon hull and machinery. During the currency of the policy there occurred the Suez crisis, as a result of which vessels which had commenced voyages which would normally take them into or through what I may conveniently call the Suez Canal area, were diverted from that area. Among the vessels so diverted were two vessels belonging to the plaintiffs, the *Dunnottar Castle* and the *Rhodesia Castle*, in respect of each of which there was current a policy in the above-mentioned form.

The plaintiffs claim that they are entitled to recover under the policy in respect of each vessel certain expenses which they allege to have been incurred by them by reason of the "prolongation of the voyage" of that vessel arising out of the diversion. The defendants deny that there is any such liability under the policies and, if they be wrong as to that, they further deny that the plaintiffs have correctly quantified their claims.

I am informed that the action is a friendly action, and that it is brought with the object of obtaining the guidance of this court, and maybe of superior courts, as to the true construction of the relevant clauses of the policy, and their application in the circumstances which arose in the Suez crisis; the parties have accordingly waived the arbitration clause in the policies. Furthermore, while not strictly a test action, the cases of the *Dunnottar Castle* and the *Rhodesia Castle* have been selected as raising a variety of questions, one or more of which are likely to arise in respect of other vessels insured by the defendants or by other mutual insurance associations who, I am informed, have issued policies in similar terms.

I have accordingly been invited to deal with the various contentions of the parties as to the true construction of the relevant clauses in the policy both as to liability and as to quantum, notwithstanding the fact that some of the views which I express may, as a result of the decision at which I have arrived, be obiter dicta, and notwithstanding, as regards quantum, the provision in the policy that "the amount recoverable shall be "assessed by the committee [of the defendants], whose decision "shall in all respects be final."

Before turning to the words of the policies which I have to construe, it is convenient that I should set out the relevant facts to which those words have to be applied.

As is well known, by the end of October, 1956, a state of acute international tension had arisen in the area of the Middle East which included the Suez Canal; the immediate cause of the crisis was the prospect of hostilities between Israel and Egypt, which in fact broke out on October 29. But the possibility of a crisis which would make it undesirable or dangerous for British ships to use the Suez Canal had been foreseen much earlier, and in particular had been foreseen by the defendants, whose directors, who are called the committee, on September 13 had passed a resolution in the following terms: "By virtue of the powers "afforded under rule 10 of the association's rules, the committee hereby authorize the managers, in the event that any "department of H.M. Government recommends that ships shall "not pass through the Suez Canal, to direct all members accordingly and to notify them that failure to comply with such "direction will be considered as a breach of warranty under "clause 5 of the association's policy." Clause 5 of the policy, at which it will be necessary to glance later, contains a warranty to comply with certain directions of the committee.

Hostilities between Israel and Egypt having broken out on October 29, the United Kingdom and French Governments, on October 30, gave to the Israeli and Egyptian Governments what was in effect an ultimatum to stop all warlike action and to withdraw their military forces to a distance of 10 miles from the Suez Canal. A 12-hour time limit was given, and failing voluntary compliance within that period, it was made clear that British and French forces would intervene to secure compliance.

At 4.30 p.m. on the same day, October 30, the Admiralty issued the following warning to merchant shipping: "In view of "the situation between Israel and Egypt, merchant shipping is "advised, for the time being and until further notice, to keep "clear of the Suez Canal and Egyptian and Israeli waters." The area to which this warning applied was defined on November 2 so as to include Port Said and Suez, but to exclude Port Sudan and Aden.

The Franco-British ultimatum was rejected by Egypt and hostilities continued with Israel. On November 1 it was announced by the Egyptian Government that the canal had been blocked as a result of Anglo-French bombing. At 9.45 a.m. on November 2 the Admiralty confirmed that the canal was blocked, but stated that this was by the action of the Egyptian authorities. It is common knowledge that it remained blocked for many months thereafter.

Now I come to the position of the *Dunnottar Castle*. This vessel had left London on October 17 on the round-Africa service, that is to say, on a round voyage from London back to the United Kingdom, going round Africa clockwise and scheduled to call at Gibraltar, Marseilles, Genoa, Port Said, Suez, Aden, Mombasa, Tanga, Zanzibar, Beira, Lourenço Marques, Durban, East London, Port Elizabeth, Capetown, St. Helena, Ascension, Las Palmas and the United Kingdom. The expected arrival and departure dates at these ports were scheduled and it is sufficient to note that her scheduled date of arrival at Port Said was October 29, and Suez October 30, and her scheduled date of arrival in the United Kingdom was December 21.

Immediately on learning of the Admiralty warning of October 30, the general manager of the plaintiffs sent a cable to the captain of the *Dunnottar Castle* in the following terms: "In "view of Admiralty warning advising merchant shipping keep "clear of Suez and Egyptian waters request you do not proceed "further meantime. Await further instructions." The *Dunnottar Castle* was in fact behind schedule, but had arrived at Port Said at 6.30 p.m. local time, or 4 p.m. Greenwich mean time, on October 30, that is to say, some three hours before the cable was sent. Her position was cabled to the general manager, who promptly sent two further cables, one to Port Said and one to the captain of the *Dunnottar Castle*; the one to the port reads as follows: "Please instruct *Dunnottar Castle* and *Tintagel Castle* "sail forthwith and proceed via Cape." That to the captain read: "Referring earlier message you should sail forthwith and "proceed via Cape. Instructions will follow regarding bunkers "and ports of call."

The vessel left Port Said in consequence of those instructions at 4.30 a.m. Greenwich mean time on October 31. The Mombasa office of the plaintiffs was informed on the same day, October 31, in the following terms: "*Dunnottar Castle Tintagel Castle* "turned Port Said and proceeding via Atlantic will advise "amended schedules soonest possible." To that the Mombasa office replied on the same date as follows: "Addressed London "repeated Cape Town *Dunnottar Castle* referring to your telegram 31st instant following passengers booked from all B E A ports Beira 32 Durban 48 Cape Town 34 London 45. If *Rhodesia Castle* routed via Cape could accommodate all above passengers if still desire travel. Telegraph instructions soonest." As a result of a further cable sent on November 2, these passengers, or some of them, were in fact transferred to the *Rhodesia Castle*.

On November 2 further instructions were sent to the *Dunnottar Castle*; they were as follows: "Reference to our telegram 31st ultimo until further notice you should continue to proceed via Cape calling at Gibraltar for water or bunkers if necessary and Las Palmas for bunkers where 1,900 tons have been stemmed. It is intended you should call at Capetown, Durban and Beira for passenger purposes only thereafter continuing to Mombasa. Passengers already on board who are proceeding to Capetown, Durban and Beira will be refunded difference between fare paid and those applying to ports concerned via West Coast. Passengers to Port Elizabeth and East London may land at Capetown or Durban at their option for carriage to port of destination by mail vessel but we cannot accept expenses while awaiting transport telegraph us when you would expect reach Las Palmas Capetown."

The defendants were in fact informed of this diversion on November 2 and acknowledged this information on November 6. The voyage which was in fact undertaken by the *Dunnottar Castle* was not quite as was set out in the instructions which I have read; it was as follows: Gibraltar, Marseilles, Genoa and Port Said (before diversion), Las Palmas, Capetown, Port Elizabeth, East London, Durban, Beira, Mombasa, Tanga, Zanzibar, Dar-es-Salaam, Beira (again), Lourenço Marques, Durban, East London, Port Elizabeth, Capetown (again), and Las Palmas (again), and she arrived in London on January 10, 1957, that is to say, 20 days later than scheduled.

As compared with the scheduled voyage on which she had embarked, of the 14 intermediate ports at which she was still due to call at the time of the diversion, she omitted to call at four ports, namely Suez, Aden, St. Helena and Ascension, and she called twice, once in each direction, at six ports, Las Palmas (for bunkers and water only), Capetown, Port Elizabeth, East London, Durban and Beira. She embarked a number of additional passengers on the first call at the last five ports, and loaded some additional freight. These passengers were carried in the reverse direction to that of the scheduled voyage. As against this, other passengers who were booked by the *Dunnottar Castle* were carried by the *Rhodesia Castle*, and some passage money was returned to passengers to Capetown and elsewhere who were carried by what was in effect a shorter route.

The facts relating to the *Rhodesia Castle* are as follows: This vessel was also engaged on the round-Africa service, but sailing from London round Africa widdershins or anti-clockwise, and scheduled to call at Rotterdam, Las Palmas, Ascension, St. Helena, Capetown, Port Elizabeth, East London, Durban, Lourenço Marques, Beira, Dar-es-Salaam, Zanzibar, Tanga, Mombasa, Aden, Port Sudan, Suez, Port Said, Genoa, Marseilles and Gibraltar. The expected dates of arrival at these ports were scheduled. She was due at Dar-es-Salaam on November 1 and 2, at Mombasa on November 4, and she was not due to enter the area to which the Admiralty warning of October 30 related until November 15, when she was scheduled to depart from Port Sudan. Her scheduled date of arrival in London was December 1.

Her plight was thus less urgent than that of the *Dunnottar Castle*, and the first move came from the Mombasa office on October 31, 1956, when a cable was sent by that office; it is the cable I have already read in connexion with the *Dunnottar Castle*, and it says that if the *Rhodesia Castle* is routed via the Cape she could accommodate all the passengers booked on the *Dunnottar Castle*.

The reply to that cable as regards the *Rhodesia Castle*, sent on the same date by the head office of the plaintiffs, was as follows: " . . . *Rhodesia Castle* position as yet too confused to " give definite instructions Cape Town informed." On November 2 the *Rhodesia Castle* was ordered to turn at Mombasa, to take passengers booked for the *Dunnottar Castle* from B.E.A. ports to Beira-Capetown and to return via Cape and Mediterranean ports.

The voyage which was in fact undertaken by the *Rhodesia Castle* was: Rotterdam, Las Palmas, Ascension, St. Helena, Capetown, Port Elizabeth, East London, Durban, Lourenço Marques, Beira and Dar-es-Salaam (before orders for diversion were given), Zanzibar, Tanga and Mombasa (before orders for diversion took effect), and then Dar-es-Salaam, Durban, Capetown, Las Palmas (for bunkers only), Genoa, Marseilles and London, where she arrived on December 11, that is to say, 10 days late.

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UNION-CASTLE MAIL S.S. CO. LTD.
v.
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Diplock J.

As compared with the scheduled voyage on which she embarked, of the seven intermediate ports at which she was still due to call at the time of the diversion, she omitted to call at five ports, namely, Aden, Port Sudan, Suez, Port Said and Gibraltar, and she called a second time at four ports already visited, namely, Dar-es-Salaam, Durban, Capetown and Las Palmas, the call at Las Palmas being for bunkers only. She called to embark or disembark passengers at Dar-es-Salaam, Durban and Capetown, and loaded freight. Passengers disembarked at these ports were carried in the reverse direction to that of the scheduled voyage of the *Rhodesia Castle*. The defendants were notified of the diversion on November 5, and they acknowledged the diversion on November 6.

On those facts the plaintiffs claim that there was a loss under clause 1 (1) (F) (2) of the policy in respect of each vessel.

In construing the policy there are three general matters to be borne in mind: First, that it is primarily a war risks policy and that it contemplates the possibility of a war in which the British Government may be engaged; secondly, that it also covers allied risks from hostilities (civil war, rebellion, etc.) in which Her Majesty's Government may not be engaged; thirdly, it is a policy on hull and machinery, not on freights or profits.

Clause 1 (1) (F), on which the plaintiffs rely, is in the following terms: "This insurance is only to cover the following, namely: " . . . (F) Expenses incurred by the assured by reason of: (1) the " detention of the insured ship in pursuance of the orders or " directions or with the approval of the committee or of any " British Government department or official or British military " authority given in order to avoid loss of or damage to the " insured ship by any peril hereby insured; (2) prolongation of " the voyage arising out of compliance with such orders or " directions, or with such approval as aforesaid; (3) detention of " the insured ship by persons engaged in war, civil war, rebellion " or revolution or by military or usurped power; (4) detention by " an official acting or purporting to act on behalf of any foreign " Government or authority not engaged in war, civil war, rebellion or revolution when such detention is considered by the " committee in its absolute discretion to have been in furtherance " of the political aims of such Government or authority." Then a franchise qualifying the whole: "Nothing shall be payable in " respect of the first seven days of each such period of detention " or prolongation and the amount recoverable shall be assessed " by the committee, whose decision shall in all respects be final."

The plaintiffs' contention is that the voyage of each vessel was prolonged in excess of seven days, that they have thereby incurred expenses, and that such expenses were incurred "by "reason of prolongation of the voyage arising out of compliance "with directions of a British Government department given in "order to avoid loss of or damage to the insured ship by a peril "insured by the policy." They rely upon the Admiralty warning of October 30, 1956, as being such directions of a British Government department; alternatively, they say that the expenses were incurred by reason of the prolongation of the voyage with the approval of the Admiralty given with such object, and also, or in the final alternative, with the approval of the committee. They rely upon the Admiralty warning as constituting the approval of the Admiralty, and upon various matters to which I shall advert later, as constituting the approval of the committee.

Was the Admiralty warning a "direction" of a British Government department? In terms it purports to be no more than "advice"; and, indeed, neither the Admiralty nor any other British Government department had power to do any more than to advise as to action to be taken to avoid loss of or damage to a British merchant vessel. Such advice has no legal sanction behind it.

But the words "orders or directions" of any British Government department or official or British military authority have a familiar and indeed an ominous ring. During the last war very wide powers to make orders, by statutory instrument, and to give directions by less formal documents enforceable by sanctions were granted to Government departments and officials, and bearing in mind that this is a war risks policy, which contemplates the possibility of a state of war, I should have little hesitation in holding that the words "orders or directions of any British "Government department or official or British military autho-"rity" applied only to instructions, the ignoring of which gives rise to legal sanctions and did not include advice, warnings or exhortations which the shipowner was at liberty to accept or disregard as he pleased.

But in clause 1 (F) the expression "orders or directions" does not apply merely to those given by Governmental authorities, but also to "orders or directions" given by the committee. Should this fact widen the meaning of the word "directions" to include advice the ignoring of which gives rise to no legal sanction? I think not. "Orders and directions" and, indeed, "recommendations" of the committee, do give rise to sanctions.

Clause 2 of the policy incorporates the rules of the association, rule 10 of which requires each member to comply with "all "orders, directions and recommendations" of the committee.

I pause to glance briefly to see whether any light can be thrown on the meaning of the words "orders or directions" by their use in other clauses of the policy, for it is a sound rule of construction that prima facie the same expressions are used in the same sense wherever they appear in the same policy. But little assistance is available from this source. Clause 1 (E) refers to "orders, directions or recommendations" of the committee, but it does not appear from the rules that there is any real distinction between these; all must equally be complied with by members. Clause 5 (A) (a) contains a warranty to comply with "orders" given by or on behalf of the Government and "directions" given by the association; clause 5 (B) (c) to "orders" given by or on behalf of the Government, and "orders, "directions and recommendations" of the committee. It is thus difficult, if not impossible, to find any systematic distinction drawn between the words "orders" and "directions," but it affords perhaps some little support to the view which I have expressed as to the meaning of the word "directions" in clause 1 (F) (1) that the word "recommendations" is used in relation to instructions of the committee, which have a sanction, in clause 1 (E), but is omitted in the immediately succeeding clause which deals with instructions by Government authorities as well as by the committee, which Governmental instructions, if merely in the form of "recommendations," would give rise to no sanctions if ignored.

I hold, therefore, that in the context of clause 1 (1) (F) the word "directions" does not include advice, warnings, recommendations or "authoritative guidance" (a dictionary definition relied upon by Mr. Mocatta—whatever the adjective in this context may mean) the ignoring of which gives rise to no sanctions. The Admiralty warning of October 30, 1956, was not, therefore, an order or direction of any British Government department within the meaning of clause 1 (1) (F) of the policy.

But there is the other limb of the clause to be considered. As I have indicated, I think that the reference to "orders or "directions" in relation to Governmental authorities contemplates a state of war in which the Government will assume emergency powers to give orders and directions for the safety of British shipping. But the risks covered by the policy include risks which may arise—as they in fact arose—without any such emergency powers being assumed. In such circumstances the Government can only express views, whether classed as advice, warnings or exhortations, as to the steps to be taken by shipowners for the safety of their ships; and it seems to me that this is the state of affairs contemplated by the latter part of the clause which is cast in wide terms and covers steps in fact taken with the approval of a Government department, in so far as their object is, in the view of the Government department, directed to avoid loss of or damage to the ship by one of the perils insured.

Whether a particular step is taken with the approval of the Government authority is a question of fact. The approval need not be given in any particular form; it may be given in advance; it may—although it does not arise in this case—be given, I think, retrospectively; it may be given generally to all ships or specifically to individual ships. If advice is given by the Admiralty to ships generally, steps taken in accordance with that advice are, in my view, taken with the approval of the Admiralty within the meaning of the clause.

The plaintiffs are therefore entitled to rely upon the Admiralty warning as constituting approval by a British Government department of such of the steps taken by them as were taken to heed the advice contained in the warning. Whether those steps constituted, or caused, a prolongation of the voyage within the meaning of the policy is another question, which will involve consideration of the terms of the Admiralty warning; but before I turn to that I must deal with the third contention of the plaintiffs, namely, that the prolongation of the voyages was with the approval of the committee.

No express approval is relied upon; none was sought. After the decision to send the *Dunnottar Castle* round Africa anticlockwise, the plaintiffs informed the defendants of it on November 2 in a letter in the following terms: "For your "information and records we have to give you formal notification "that, following the Admiralty advice with regard to shipping "likely to be affected by operations in the Egyptian crisis, the "*Dunnottar Castle*, which arrived at Port Said on 30th ultimo "*en route* for East and South Africa via Suez Canal, was turned "round and is now proceeding back through the Mediterranean "and will make her passage via the Cape"; and similarly, as respects the *Rhodesia Castle*, on November 5 they wrote a letter in the following terms: "We understand that the War Risks "Associations have agreed to meet, to some extent, the additional "expenses incurred by owners through diversions owing to the "Egyptian hostilities. We have already notified you of the "*Dunnottar Castle* turn round at Port Said, and we now give "you formal advice that the *Rhodesia Castle* and *Braemar Castle* "which were already on Round-Africa voyages, out via the Cape "and home via the Suez Canal, will be turned round at Mombasa "and Beira respectively," and then follows a query as to the meaning of the clause and the intentions of the clubs.

The notification as regards the *Dunnottar Castle* was acknowledged on November 6 in a letter in the following terms: "Dear "Sirs, m.v. *Dunnottar Castle*. We are obliged for your letter of "the 2nd instant advising that following the recent Admiralty "advices concerning the Egyptian crisis, this vessel which "arrived at Port Said on the 30th ultimo *en route* for East "and South African ports through the Suez Canal has been "turned round and re-routed via the Cape. We are noting our "records accordingly." The acknowledgment of the notification as regards the *Rhodesia Castle* appears in another letter of the same date, which reads as follows: "Dear Sirs, Suez Canal—"Diversions. Since acknowledging yours of the 2nd instant "regarding your *Dunnottar Castle*, we received your letter of "yesterday advising that your *Rhodesia Castle* and *Braemar* "*Castle* are also involved in these diversions. We observe that "both will be turned round at Mombasa and Beira respectively "for return home via the Cape instead of through the canal," and then there is a paragraph which deals with the intentions of the association as regards claims under these policies.

The information as to the change of plans for the *Dunnottar Castle* and the *Rhodesia Castle* was, as I have pointed out, noted by the managers—not by the committee—on November 6. The association were not informed of the plaintiffs' intentions that both the *Dunnottar Castle* and the *Rhodesia Castle* should make calls additional to the scheduled calls for passengers or freight at various African ports, calls which would affect the delay in the vessel's return to her final port in the United Kingdom. There is nothing here approaching approval—as contrasted with mere knowledge—and the resolution of September 13, 1956, on which the plaintiffs also rely, seems to me to give rise to no inference either favourable to the plaintiffs or against them, since it was directed, not to clause 1 (F) (2), but to the warranty in clause 5.

I hold that there was in fact no approval, express or implied, by the committee within the meaning of the policy to any of the steps taken by the plaintiffs, nor can the committee's failure to raise objections to those steps give rise to any estoppel, since I can see no duty upon them to speak.

The only matter which has given me some trouble is the admission in the defence that if the plaintiffs had asked for the committee's approval, they would in fact have approved the instructions given to the masters of the vessels, which I understand to mean the full re-routing instructions, including the additional calls at the various African ports and the omission of calls at other scheduled ports. I do not, however, read this admission as including an admission that the approval of the detailed re-routing instructions would have been given "in order "to avoid loss of or damage to the insured ship by any peril "insured"; but in any event the fact that the committee would have approved, if asked, appears to me to be irrelevant. It cannot amount to an implied approval when none was in fact sought or given, any more than a contract for the sale of goods could be implied from an admission that a potential buyer would have accepted an offer if it had been made when in fact it was not.

I come next to the questions: (1) Which, if any, of the steps in fact taken by the plaintiffs in relation to each vessel were taken in compliance with the Admiralty warning? and (2) Did those steps constitute or cause a prolongation of the voyage within the meaning of clause 1 (1) (F) (2)?

As regards the first question, the Admiralty warning merely advised ships to keep clear of a defined area in the Mediterranean and the northern part of the Red Sea. It was plainly given to avoid loss of or damage to merchant ships by perils which were in fact covered by the policies which I am construing.

In turning the *Dunnottar Castle* back from Port Said out of the area covered by the warning, and in preventing her proceeding further into the area to Suez and through the canal, the plaintiffs were acting with the approval of the Admiralty; and, indeed, the orders to this ship to turn about were given in consequence of the warning and for no other reason. So, too, in preventing the *Rhodesia Castle* from proceeding into the area covered by the warning, the plaintiffs were acting with the approval of the Admiralty, and I think that it matters not if their motive in so acting was a mixed one, and influenced by the probability that the canal was already blocked when the decision so to act was taken, and the even greater probability that it would be blocked by the time the *Rhodesia Castle* was scheduled to arrive at the canal.

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UNION-CASTLE MAIL S.S. CO. LTD. v. UNITED KINGDOM MUTUAL WAR RISKS ASSOCIATION LTD.

Diplock J

But in turning round at Mombasa instead of at Port Sudan, and failing to proceed to Aden and Port Sudan, which were scheduled calls upon the voyage of the *Rhodesia Castle*, the plaintiffs were not complying with the Admiralty warning or acting with the Admiralty approval. To turn round at Mombasa, however, did not increase, but decreased, the delay in the vessel's return to her final port in the United Kingdom.

As regards the second question, the defendants say: Even assuming those particular steps were taken as respects one or other vessel with Admiralty approval, it does not follow that the delay in the return of that vessel to London, which in fact occurred, was a prolongation of the voyage with Admiralty approval, a fortiori, with Admiralty approval given in order to avoid loss of or damage to the vessel by an insured peril. All that concerned the Admiralty was that the vessel should not be in the danger area. The Admiralty's approval was in fact limited, and its relevant approval under the policy must, in law, be limited to that.

The actual amount of delay in the return of the *Dunnottar Castle* to its final port in the United Kingdom was due to a number of factors with many of which the Admiralty were not concerned—the owners' decision to go round the Cape to Mombasa, to call at intermediate ports on the way to disembark passengers and to embark them for onward carriage to Aden, St. Helena and Ascension, and similarly with the case of the *Rhodesia Castle*.

The defendants put their contention in a variety of ways. They say that the Admiralty approval was merely to keeping away from a particular area; it did not operate on anything done outside that area. They say that there was no sufficiently proximate connexion between the Admiralty approval of keeping out of the area and the voyage actually undertaken round the Cape. They say that the original voyage was not prolonged, but abandoned, and a new voyage undertaken; the voyage was changed.

I think the first view, namely, that the Admiralty approval did not operate upon anything done outside the area of the warning, puts the matter too high. If the result of keeping away from the defined area is necessarily to cause a deviation which prolongs the length of the voyage upon which an insured vessel is engaged, the expenses incurred as a result of that prolongation would, in my view, be recoverable, subject to the franchise, under the policy. I gave in the course of the argument the example of a vessel on a voyage to Bombay which, as a result of the Admiralty warning, went round the Cape instead of through the canal. The expenses incurred by the prolongation of the voyage to Bombay would, in my view, be recoverable, subject to the franchise.

The second and third contentions are, I think, two different ways of expressing the same thing. The peril insured against is a prolongation of " the voyage "; that is, the voyage upon which the vessel is engaged at the moment at which the steps are taken with the Admiralty approval in order to avoid loss of or damage to the insured ship by a peril insured. At that stage it is open to the owner to continue the voyage with a deviation, in which case he may have a claim under the policy, or to abandon the voyage, or to change the voyage, in which case he has no claim under the policy. Which of these courses he has in fact adopted is in each case a question of fact, and, indeed, may be one of degree.

In each of the present cases I hold that the voyage on which the vessel was engaged at the moment at which steps were taken to avoid the area referred to in the Admiralty warning was changed.

In the case of the *Dunnottar Castle* it does not seem to me that the movements she in fact undertook after turning back from the Suez area can be considered as a continuation of the same voyage on which she was engaged when she turned back. A call at Las Palmas for bunkers would no doubt not affect the identity of the voyage; nor would an omission to call at ports within the area to which the Admiralty warning applied; nor should I be understood as saying that some minor variation in the order of calling at scheduled ports must necessarily amount to a change of voyage. But calls at four South African ports and one Portuguese East African port to carry new passengers in the reverse direction from the original voyage, the omission to call at Aden and two other ports (I exclude Suez, which was in the warning area), however sensible it may be as a matter of commercial common sense, seems to me to amount to a new or changed voyage, and not to a prolongation of the voyage within the meaning of the policy.

I am fortified in this view by the impossibility of saying to what extent the actual delay in the arrival of the vessel at her final port in the United Kingdom was due to these different calls and omissions to call, which the owners undertook for their own commercial convenience and which bore, so far as I can see, no causal relation to the Admiralty warning, save that that warning was no doubt a causa sine qua non. Similar considerations appear to me to apply to the *Rhodesia Castle*, and I do not think it is necessary to deal with the detailed calls and omissions to which I have already referred.

I therefore find that the plaintiffs are not entitled to recover under either of the policies.

I have, however, been asked to deal—as it turns out in this case, obiter—with certain questions of principle as to the method of assessing the expenses recoverable in cases where there is a valid claim under a policy in these terms.

The matter has been pleaded in a number of different ways, but the real issues are whether, in quantifying the claim, the assured must give credit for any savings of expenses as a consequence of the deviation which results in prolongation of the voyage (such as savings of Suez Canal dues or port charges at ports omitted), and for any financial benefits which accrue as a consequence of such deviation (such as additional freight or fares earned).

What he is entitled to recover is: "Expenses incurred by "reason of the prolongation of the voyage." If those words stood by themselves, "prolongation" might conceivably be construed in a geographical sense, although this is not the primary sense in which I would read it. Alternatively, it might be construed as meaning that the assured could recover the difference between the expenses actually incurred by him during the whole of the prolonged voyage and those which would have been incurred if the voyage had been carried out as originally contemplated.

But these words do not stand alone. That "prolongation" is used in a purely temporal sense appears from the reference to "period of prolongation" in the last part of the clause; there may be deviation without "prolongation." The provision that nothing shall be payable in respect of the first seven days of such period of "prolongation" seems to me to make two things plain: First, that "prolongation" does not start until the date on which the voyage normally would have ended; and secondly, that it is the actual expenses incurred during the voyage after the expiry of such seven days which are recoverable, although no doubt this is a figure which may in practice have to be estimated.

It does not seem to me that any savings made in consequence of the deviation which resulted in the prolongation of the voyage have any relevance to this calculation, any more than any additional expenses which may have been incurred before the expiry of the seven days after the date upon which the voyage would normally have ended.

The policy is not one against loss of profits or on freight; nor is the clause analogous to a sue and labour clause, and the highly theoretical possibility that the assured might, as a result of savings, be in a better position than if there had been no deviation, does not persuade me to place any other construction than I have upon the words.

The same considerations apply to benefits. The clause relates to expenses only; but the kind of benefit which has been discussed in the present cases seems to me to be unlikely to accrue except in cases where there has been a change of voyage, in which case, as I have held, there is no claim under the policy.

It is, I suppose, possible that by reason of late arrival at intermediate ports consequent upon deviation, a shipowner might obtain additional passengers or freight for onward carriage, but it does not seem to me that the policy or the clause is concerned with such matters, any more than it is concerned with loss of booked passengers or freight for onward carriage which results from such delay.

I hold, therefore, that neither savings made before prolongation, nor benefits which accrued as a result of the prolongation, should be taken into consideration in assessing the claim under the policy.

As this is a friendly action, and as I have been told that the defendants are paying the costs in any event, I think there is nothing that really remains for me to deal with.

Judgment for the defendants.

Solicitors: *Holman, Fenwick & Willan; Richards, Butler & Co.*

J. F. L.

1957
Nov. 21, 22;
Dec. 5.
1958
Jan. 13.

Ashworth J.

WARNER *v.* SAMPSON AND ANOTHER.

[1955 W. No. 1371.]

Landlord and Tenant—Forfeiture of lease—Repudiation of landlord's title—Action by landlord for possession—General denial of statement of claim in defence—Denial of landlord's title by one of two executors—No defence by other executor—Reply by landlord forfeiting lease—Denial of title binding on both executors—Administration of Estates Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 23), *ss.* 2 (2), 55.

Landlord and Tenant—Forfeiture of lease—Relief from forfeiture—Forfeiture by operation of law—Whether section applicable—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 146.

Barrister—Authority to bind client—Pleading—General denial effecting forfeiture of lease—No disregard of specific instructions—"Mistake"—Effect of forgetfulness binding on client.

Executor and Administrator—Executor—"Conveyance"—Lease—Disclaimer—Denial of landlord's title in defence of one of two personal representatives—Denial in defence not a "disclaimer"—Administration of Estates Act, 1925, *ss.* 2 (2), 55.

Practice—Pleadings—Action for possession—General denial—Whether amounting to forfeiture of lease.

By section 2 (2) of the Administration of Estates Act, 1925: "Where as respects real estate there are two or more personal "representatives, a conveyance of real estate devolving under this "Part of this Act shall not . . . be made without the concurrence "therein of all such representatives . . ." By section 55 "'conveyance' includes a mortgage, charge by way of legal mortgage, "lease, assent, vesting, declaration, vesting instrument, disclaimer, "release and every other assurance of property or of an interest "therein by any instrument . . ."

On April 27, 1955, a landlord issued a writ against two defendants, suing them as the legal personal representatives of the lessee and claiming possession of the demised property on the grounds of non-payment of rent and breaches of covenant contained in the lease. The statement of claim, inter alia, referred to the lease, set out the title of the landlord and specified the breaches of covenant alleged. On May 27, 1955, judgment in default of appearance was entered against the first defendant. On June 14 the solicitors for the second defendant instructed counsel to draft a defence in order to stay the landlord's hand while efforts were made to remedy the breaches of covenants, and on June 15 a defence, signed by counsel, was delivered on behalf of the second defendant, in which she admitted that she was appointed executrix of the will of the lessee, and denied the alleged breaches of covenant; by paragraph 3: "Save and except for the admission herein contained this defendant denies each and every allegation in the statement of claim "as if the same were specifically set out and traversed seriatim." On June 29 the landlord delivered a reply alleging that by that defence the second defendant had disclaimed and disputed the landlord's title as landlord and that she (the landlord) was entitled, and thereby exercised her right, to forfeit the term. On August 26 the judgment against the first defendant was set aside and, after an appeal by the landlord, the second defendant was given leave to amend, but not to withdraw, her defence. Thereafter a defence by the first defendant and the amended defence of the second defendant, both of which admitted the lease and the title of the landlord and contained a counterclaim asking for relief from forfeiture under section 146 of the Law of Property Act, 1925, were delivered, but the landlord contended that there was no jurisdiction to grant relief from the forfeiture resulting from the pleadings:—

Held, (1) that, on the construction of the pleading, the comprehensive denial in paragraph 3 of the second defendant's defence was a denial of the lease.

(2) That the denial was binding on the second defendant; it was due to a lapse or to forgetfulness on the part of counsel and was neither a mistake nor unintentional (in the sense that the mind of counsel did not go with his signature), nor was there any misunderstanding or disregard by counsel of specific instructions.

Neale v. *Gordon Lennox* [1902] A.C. 465; 18 T.L.R. 791 and *Lewis's* v. *Lewis* (1890) 45 Ch.D. 281 distinguished.

Barrow v. *Isaacs & Son* [1891] 1 Q.B. 417; 7 T.L.R. 175 considered.

(3) That it followed that had the second defendant been the sole lessee when her defence was delivered the lease would have been forfeited as soon as the landlord's reply was delivered.

Kisch v. *Hawes Brothers Ltd.* [1935] Ch. 102 applied.

(4) That the fact that the lease was vested in both defendants as executors did not prevent the denial from effecting a forfeiture, for the consequences of the denial of the title of a landlord in a defence by one of two executors were, in the absence of a defence admitting the title by the other, binding on them both, and such a denial was in essence a repudiation of the tenancy and not a "conveyance" within sections 2 (2) and 55 of the Administration of Estates Act, 1925.

The "disclaimer" contemplated by the definition of conveyance in section 55 of the Act of 1925 is a document recognizable and identifiable as a disclaimer which would in the normal course start with the words "This disclaimer . . ." or contain the word disclaim; and, therefore, the definition does not include a denial of the title of a landlord contained in a pleading.

Simpson v. *Gutteridge* (1816) 1 Madd. 609 and *Doe* d. *Ellerbrock* v. *Flynn* (1834) 1 C.M. & R. 137 applied.

(5) That the forfeiture arose by operation of law and not under any proviso or stipulation in the lease within the meaning of section 146 of the Law of Property Act, 1925, and that, therefore, the section had no application and the defendants were not entitled to ask for relief.

Held, further, that it was immaterial that the judgment against the first defendant was set aside in August, 1955, and that a defence admitting the title of the landlord was subsequently delivered on his behalf, because it was then too late and the landlord's right to forfeit had already accrued.

ACTION.

By a lease, dated February 23, 1905, a house, No. 18, Park Avenue South, Hornsey, was let by the plaintiff's predecessors in title for a term of 99 years from June 24, 1900, at a yearly rent of £8 8s. The lease contained covenants on the part of the lessee to repair, to paint both the inside and outside of the house, to register with the lessor's solicitors any change resulting from assignment on the death of the lessee or assignee and to keep the property adequately insured against fire. In 1931 the plaintiff's interest in the house became vested in her and at some date before the year 1947 the term became vested in Mrs. Gertrude Annie Sampson. Mrs. Sampson died on June 23, 1949, having by her will appointed the defendants, Arthur Cecil Sampson and Esther Mary Gandy, her executors and trustees. By clause 4 of her will Mrs. Sampson bequeathed the house to her trustees upon trust to permit the first defendant to use and occupy it or to receive the rents, profits and income thereof, he being responsible for all outgoings and for repairs and for insurance, and after his death in trust for her son and daughter; by clause 5 she directed her trustees to set aside out of the estate a sum of £200 as a fund to meet out of the capital and income thereof the cost of any claim for dilapidations at or near the expiration of the lease. On February 16, 1950, the will was proved.

For a few years after Mrs. Sampson's death the rent due under the lease was paid but no payment was made at Michaelmas, 1953 or 1954, or at Lady Day, 1954 or 1955. In January, 1955, the plaintiff served on each of the defendants notice of breaches of covenant. The second defendant was anxious about the position and in fact interviewed the plaintiff's solicitors, but the first defendant would not respond to persuasion or pressure by her and others that he should perform the covenants in the lease. As a result, on April 27, 1955, the plaintiff issued a writ against the defendants, suing them as the legal personal representatives of Mrs. Sampson, and claiming possession of the house, damages and mesne profits. In her statement of claim the plaintiff referred to the lease, stated that the lessor's interest in and title to the premises were vested in her, and alleged nonpayment of rent and breaches of certain of the covenants in the lease. On May 27, 1955, judgment was entered against the first defendant in default of appearance.

On June 14 the solicitors then acting for the second defendant instructed counsel to draft a defence in order to stay the landlord's hand while efforts were made to induce the first defendant to do something to remedy the matter, and counsel duly drafted and signed a defence which was delivered on June 15, 1955. That defence, by paragraph 1, admitted that the second defendant was appointed an executrix of the will, and by paragraph 2 denied that she had committed any breach of covenant; by paragraph 3: "Save and except for the admission "herein contained this defendant denies each and every allega-"tion in the statement of claim as if the same were specifically "set out and traversed seriatim."

On June 29, 1955, the plaintiff delivered a reply joining issue with the second defendant on her defence, and alleging that "2. By her said defence the second defendant has disclaimed "and disputed the plaintiff's title as her landlord, and the plain-"tiff is thereby entitled to forfeit the same term created by the "said lease referred to in paragraph 2 of the statement of claim. "3. The plaintiff hereby exercises her said right to forfeit the "said term, and claims to be thereby entitled to re-enter upon "the said premises."

On August 26, 1955, an order was made by Master Grundy setting aside the judgment against the first defendant and giving leave to the second defendant to withdraw her defence. The plaintiff appealed, and on October 6 Pearson J. varied the order by giving leave to the second defendant to amend (but not withdraw) her defence. On February 14, 1956, the defence of the first defendant and the amended defence of the second defendant were delivered, both of which defences, inter alia, admitted the lease and the title of the plaintiff and, having made certain other admissions, contained a counterclaim for relief from forfeiture under section 146 of the Law of Property Act, 1925. The plaintiff's reply alleged that the second defendant by her defence delivered on June 15, 1955, had denied the plaintiff's title "whereby the said term became and is forfeited to the "plaintiff and wherefor the plaintiff claims possession of the "said premises and mesne profits from date of forfeiture."

On November 8, 1956, the plaintiff died and the proceedings were by order continued as between her administratrices and the defendants.

L. G. Scarman Q.C. for the landlord.

J. H. Hames for the defendants. A denial of a landlord's title does not give rise to forfeiture unless it is clear and unambiguous and intentional: *Wisbech St. Mary Parish Council* v.

Lilley.[1] As a matter of construction, there is no such denial in the defence of the second defendant. All that the pleader intended was to deny the alleged breaches of covenant, and the denial of any breach in paragraph 2 is an implicit admission of the existence of the lease containing the covenants. [Reference was also made to R.S.C., Ord. 19, r. 14.] A denial of fact must be pleaded specifically, but paragraph 3 of the defence is a general denial only of matters not previously admitted and is not sufficient to override the admission necessarily implied in paragraph 2: see R.S.C., Ord. 19, rr. 13, 15, 17, and Ord. 20, r. 7. There is in this pleading no positive allegation as there was in *Kisch* v. *Hawes Brothers Ltd.*[2]; nor does it "admit of no doubt "as to the nature of what is done": see the judgment of Lord Denman C.J. in *Doe* d. *Graves and Downe* v. *Wells.*[3] The construction of pleadings should not be stretched to extract a disclaimer where none was intended, and in the circumstances, and in view of the serious consequences which might result to the defendants, the court is asked to put upon the pleadings the construction most favourable to them.

By section 2 (2) of the Administration of Estates Act, 1925, where there are two or more personal representatives, "a conveyance of real estate . . . shall not . . . be made without the "concurrence therein of all such . . . representatives," and by the definition in section 55 (1) (iii) "'conveyance' includes . . . a disclaimer, release and every other assurance of property or of an "interest therein by any instrument." If, therefore, paragraph 3 of the defence of the second defendant does amount to a disclaimer of the lease, it is not a disclaimer by the lessee, but a disclaimer by one of two personal representatives which, by virtue of sections 2 (2) and 55 of the Act of 1925, is insufficient to pass the estate.

Personal representatives hold as joint tenants. An effective judgment for possession against joint tenants must be obtained against them all: *Gill* v. *Lewis.*[4] The judgment entered against the first defendant on May 27, 1955, therefore, did not affect the joint tenancy, and at the time when the defence of the second defendant was delivered the legal estate was still vested in both defendants as joint tenants. A disclaimer by one of two joint tenants will not determine the legal estate vested in both: see

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[1] [1956] 1 W.L.R. 121; [1956] 1 All E.R. 301.

[2] [1935] Ch. 102.

[3] (1839) 10 Ad. & E. 427, 435.

[4] [1956] 2 Q.B. 1; [1956] 1 All E.R. 844.

In re Schar, decd.,[5] where Vaisey J.,[6] although dealing with a different type of disclaimer, stated the principles to be applied, and *Leek and Moorlands Building Society* v. *Clark.*[7] As the judgment against the first defendant was inoperative (and in any event it was set aside), there are now two defences before the court. Where executors plead different defences the court will have regard to that which is most for the advantage of the testator's estate: *Midgley* v. *Midgley*[8]; and see Williams on the Law of Executors and Administrators, 13th ed. (1953), vol. 1, p. 455. The defendants, therefore, are entitled to rely on the admission of the lease in the defence of the first defendant.

If paragraph 3 of the defence of the second defendant does contain a denial of the landlord's title, then it is not a denial by the second defendant. Counsel has no authority to bind his client if he is acting contrary to positive instructions: *Neale* v. *Gordon Lennox*[9]; and see also The Annual Practice, 1957, p. 2006. The instructions to counsel were, in effect, to preserve the lease as an asset of the estate, and it follows that a disclaimer of the lease was in the teeth of the express instructions given to counsel and not binding on his client. There is a difference between a case where the result of the actions of counsel is not that which was intended by his client, and a case where counsel does exactly what his client tells him not to do. [Reference was also made to *Scheyer* v. *Wontner*[10] and *Matthews* v. *Munster.*[11]] In *Lewis's* v. *Lewis*[12] Kekewich J., distinguishing *Matthews* v. *Munster*,[13] held that a compromise entered into by counsel where there had been a misapprehension as to the terms to which his client had consented, was not binding on the client; the present is a stronger case because, in acting contrary to his instructions, counsel did that which he had no right to do. It is further contended that the denial is not binding on the second defendant, because it was not intended, and the mind of counsel did not go with his signature. As to the importance of intention to set up a title adverse to that of the landlord, see *Wisbech St. Mary Parish Council* v. *Lilley.*[14] Alternatively, the denial was a mistake by counsel the consequences of which should not be imposed upon the defendants. Reliance is placed on the observations of

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[5] [1950] 1 Ch. 280; 66 T.L.R. (Pt. 2) 1131; [1950] 2 All E.R. 1069.

[6] [1950] 1 Ch. 280, 285.

[7] [1952] 2 Q.B. 788; [1952] 2 T.L.R. 401; [1952] 2 All E.R. 492.

[8] [1893] 3 Ch. 282; 9 T.L.R. 565.

[9] [1902] A.C. 465; 18 T.L.R. 791.

[10] (1890) 90 L.T.J. 116.

[11] (1887) 20 Q.B.D. 141; 4 T.L.R. 102.

[12] (1890) 45 Ch.D. 281.

[13] 20 Q.B.D. 141.

[14] [1956] 1 W.L.R. 121.

Lord Esher M.R. in *Matthews* v. *Munster*[15] that the power of counsel can be controlled by the court, and[16] "if, therefore, "counsel were to conduct a cause in such a manner that an "unjust advantage would be given to the other side, or to act "under a mistake in such a way as to produce some injustice, "the court has authority to overrule the action of the advo-"cate." [Reference was also made to *Harvey* v. *Croydon Union Rural Sanitary Authority*.[17]] The court has a general jurisdiction to do justice between the parties and a discretion to grant relief from the consequences of an action by counsel done either contrary to his instructions or by mistake, and, on the authorities cited, the circumstances of this case are such that that discretion should be exercised in favour of the defendants.

Kisch v. *Hawes Brothers Ltd.*[18] is not conclusive against the defendants in this case and should be distinguished: there there was a positive claim by the defendant which amounted to a claim of title, not a mere general traverse; the offending defence there was left unamended down to the date of trial; it was not suggested that the defence was filed contrary to instructions, and the disclaimer was there made by the lessee in the technical sense and not by one of two joint tenants. Further, it does not appear that the issue of forfeiture was fully argued. *Barton* v. *Reed*[19] suggests that a disclaimer may not necessarily have a fatal effect, because in that case the plaintiffs, by agreement, waived the forfeiture "if any"—see the article on that case in 76 Solicitors' Journal, p. 73—and the defendants were allowed to put in a proper defence; had the disclaimer effected an automatic determination of the interests of the defendants, it would not have been possible to revive their interests by new defences.

The doctrine of forfeiture by disclaimer is part of the old feudal system of land tenure, and the old authorities are therefore of greater persuasive authority than modern decisions given when the principle was already archaic. For an old example of the application of the doctrine, see Rolle's Abridgement, vol. 1, p. 853, *l* 41—not cited in *Kisch* v. *Hawes Brothers Ltd.*[20]—"En "un real action vers lessee pur vie sil perde per mispleder, ceo "nest ascun forfeiture." That passage is repeated in Comyn's Digest of the Laws of England [(A. 5)], 1st ed. (1765), vol. 3, p. 383, as: "But it is no forfeiture . . . if tenant for life loses "to a stranger by involuntary mispleading. 1 Rol. 853, *l* 41."

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[15] 20 Q.B.D. 141.

[16] Ibid. 143.

[17] (1884) 26 Ch.D. 249.

[18] [1935] Ch. 102.

[19] [1932] 1 Ch. 362.

[20] [1935] Ch. 102.

It is submitted that "mispleder" is equivalent to a plea by mistake. The basis of the feudal principle was that a tenant must not do anything adversely affecting the landlord; what is still serious today is an intentional setting up of a title adverse to that of the landlord, but there is no reason why in modern times a tenant should forfeit his estate by reason of an involuntary mistake such as this which could not harm the landlord.

L. G. Scarman Q.C. for the landlord. Paragraph 3 of the defence of the second defendant is an express denial of the landlord's title. It is the established practice in pleading to deny allegations in the words used in that paragraph and it must be read as a specific denial of every allegation in the statement of claim other than the one "admission" in paragraph 1: see The Annual Practice, 1957, p. 361, in particular paragraph 2 of the note to R.S.C., Ord. 19, r. 17. If there is any ambiguity in the defence, it should be resolved in favour of the person against whom it is put forward and not in favour of the person whose defence it is.

It is immaterial whether or not the defendants held as joint tenants. At common law the act of one executor is the act of them all: see Bacon's Abridgement, 6th ed. (1807), vol. 3, p. 30, and *Simpson* v. *Gutteridge*,[21] where Plumer V.-C.[22] pointed out the difference between executors who "are considered only as "one" and joint tenants. At common law, therefore, an assertion giving rise to a forfeiture made by one of two executors will give rise to forfeiture of the entire interest possessed by that executor notwithstanding that another executor is also entitled to the same interest, for each "has an entire authority and interest "in the term as executor": *Simpson* v. *Gutteridge*.[23]

Section 2 (1) of the Administration of Estates Act, 1925, preserves common law and equitable powers and duties save in so far as they are modified by that Act, but it is submitted that there is no modification of the common law principle on which the landlord relies. Section 2 (2) of the Act of 1925 is concerned with "a conveyance of real estate" and has no application to what has been called a "disclaimer" in this case. In describing an act giving rise to forfeiture the word "disclaimer" is not used in the authorities as a term of art but as a description of what is necessarily a wrongful act, that is, an act which is a wrong to the landlord and contrary to the relationship of landlord and tenant. The word "disclaimer" does not appear at all in the report of *Doe* d. *Ellerbrock* v. *Flynn*,[24] but it was argued that[25] "The rule of law on the subject is founded on feudal principles. "According to the feudal law, every act tending to the disherison "of the lord was accounted a forfeiture," and Lord Lyndhurst C.B. said[26]: "If a tenant sets up a title hostile to that of his "landlord, it is a forfeiture of his term." The true nature of the act on which the landlord relies is stated in Bacon's Abridgement, Lease (T.) 2 [6th ed. (1807), vol. 4, p. 884], cited in argument in *Doe* d. *Ellerbrock* v. *Flynn*[27]: "Any act of the "lessee, by which he disaffirms or impugnes the title of his lessor, "occasions a forfeiture of the lease. For to every lease the law "tacitly annexeth a condition, that if the lessee do any thing "that might impair the interest of his lessor, the lease shall be "void, and the lessor may re-enter." Such an act cannot be a "conveyance" within section 2 (2) of the Administration of Estates Act, 1925, which also contemplates a "conveyance" made by order of the court. But the word "disclaimer" when used as a term of art, for example, a "disclaimer" by a legatee, or of office by a person appointed trustee or executor, or by a trustee in bankruptcy, falls aptly within the definition of conveyance in section 55 of the Act. It is submitted that, applying the ejusdem generis rule of construction to the definition, "con-"veyance" in sections 55 and 2 (2) refers only to lawful assurances of property and instruments. There is, therefore, nothing in the Act of 1925 which affects the common law position that, if one of two executors does an act tending to disinherit his landlord, that act is binding on both.

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[21] (1816) 1 Madd. 609.

[22] Ibid. 616.

[23] 1 Madd. 609, 617.

The denial of the landlord's title in paragraph 3 of the defence of the second defendant, being a breach of a condition annexed by law to the lease, should not be regarded as an act which shifts the estate but as one which gives the landlord the right to forfeit. The material date, therefore, was June 29, 1955, the date on which the landlord exercised the right to forfeit by delivering the reply; nothing which happened after that date is of relevance. The principle in *Midgley* v. *Midgley*[28] cannot assist the defendants, for at the material time when the landlord elected to claim forfeiture one executor had submitted to judgment and the only defence was the defence which gave the landlord that right. At the time the judgment against the first defendant was set aside the landlord had a vested right to possession of which she could

[24] (1834) 1 C.M. & R. 137.
[25] Ibid. 138.
[26] Ibid. 141.
[27] Ibid. 139.
[28] [1893] 3 Ch. 282.

not be deprived. Although some interest may have remained in the first defendant after judgment had been given against him, his defence cannot be antedated and the decision in *Gill* v. *Lewis* [29] has no relevance.

Even if the argument that one joint tenant has no power to dispose of the interests of the other joint tenants is correct, the authorities to that effect are concerned with the exercise by one joint tenant of a power which, if exercised by them all, would be lawful, not with a case where one joint tenant is seeking to avoid responsibility for an act in the nature of a breach of a condition in a lease for which all the joint tenants are responsible.

The term "mispleder" used in Rolle's Abridgement, vol. 1, p. 853, *l* 41, is explained in Comyn's Digest of the Laws of England [(A. 5)], 1st ed. (1765), p. 383, as "involuntary mis-"pleding." The report appears to refer to a tenant for life and must be read in its context: see the next line [Rolle's Abridgement, vol. 1, p. 853, *l* 42] "Mes si plaintiffe recouver per render "del lessee, ceo est forfeiture." In any event it is submitted that, in view of subsequent authority, it would not be safe to follow Rolle's Abridgement on this point.

Paragraph 3 of the defence of the second defendant is her act. Counsel was not acting "in the teeth of his instructions." No positive instructions were in fact given to him, and although it is accepted that he made a mistake, and that had his attention been drawn to the results he would have pleaded differently, that does not mean that the pleading was involuntary, or not deliberate, or that the mistake was not within the discretion given to him. Reliance is placed on *Matthews* v. *Munster*,[30] in particular on the observations of Lord Esher M.R.[31]: "But "when the client has requested counsel to act as his advocate ". . . he thereby represents to the other side that counsel is to "act for him in the usual course, and he must be bound by that "representation so long as it continues," and [32]: "The client "was not present, and it is not pretended that he ever withdrew "his authority to counsel, but he now comes forward and asks "that because he does not like what has been done it should be "set aside as between him and his opponent." The second defendant left it to her solicitor to take whatever steps he thought right, and the act of record on which the landlord relies was within the actual and ostensible authority of her solicitor and counsel; there was nothing to indicate to the landlord that the pleading went beyond that authority, and she must be bound by it. *Neale* v. *Gordon Lennox*[33] is authority for the proposition that, in the case of a bargain concerning the conduct of a dispute before the court, the court has an overriding discretion to ensure that neither party suffers injustice through a mistake by counsel; but here the landlord is not seeking to hold the defendant to a bargain relating to the conduct or settlement of a suit, but is asking the court to give effect to a right vested in her as a result of a breach of a condition annexed by law to the lease. Nor is this a mistake in respect of which the court has jurisdiction to grant relief; the mere fact that the mistake is that of a professional agent is not sufficient to evoke that jurisdiction, nor is the fact that the mistake is due to forgetfulness: *Barrow* v. *Isaacs & Son.*[34] For the attitude of a court of equity towards a forfeiture under the substantive law, see *Peachy* v. *Duke of Somerset.*[35]

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[29] [1956] 2 Q.B. 1; [1956] 1 All E.R. 844.

[30] 20 Q.B.D. 141.

[31] Ibid. 143.

[32] Ibid. 144.

The position in this case is the same as it was in *Kisch* v. *Hawes Brothers Ltd.*,[36] where the amendment to the defence was ineffective to prevent the forfeiture. [Reference was also made to *Clifton Securities Ltd.* v. *Huntley.*[37]]

[He was stopped.]

J. H. Hames in reply. The defendants must be regarded as holding as joint tenants vis-à-vis the landlord, and the only relevance of the fact that they are executors is that they hold the estate on trust. It is submitted that the authorities on this point decided before the passing of the Administration of Estates Act, 1925, are no longer of any effect.

The denial in paragraph 3 of the defence of the second defendant amounts to a " conveyance " within section 2 (2) of the Act of 1925. It is wrong to say that it should be treated as a breach of a condition or covenant attached to the lease, for all that a landlord may rely on in a case such as this is a rule of evidence or estoppel in pais, whereby the court will not allow a tenant to bring evidence tending to set up a title adverse to that of his landlord. Breach of a condition annexed by law to a lease would not itself operate a forfeiture but would result in a " disclaimer " by operation of law.

In neither *Barrow* v. *Isaacs & Son*[38] nor in *Peachy* v. *Duke of Somerset*[39] was there a mistake by counsel, and it is submitted that the right approach to this case is that laid down in *Neale* v. *Gordon Lennox.*[40]

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[33] [1902] A.C. 465.
[34] [1891] 1 Q.B. 417.
[35] (1721) 1 Strange 447.
[36] [1935] Ch. 102.
[37] (1948) 64 T.L.R. 413; [1948] 2 All E.R. 283.
[38] [1891] 1 Q.B. 417.
[39] 1 Strange 447.

Cur. adv. vult.

December 5. ASHWORTH J. read the following judgment, in which he stated the facts and continued: Shortly after the writ had been served on him, the first defendant attempted to make good his default in payment of rent, and there is included both in his defence and in the second defendant's amended defence a plea of tender. In the course of the hearing before me, Mr. Hames conceded on behalf of the defendants that this plea could not be maintained and I need not discuss it further.

Some of the breaches of covenant referred to in the statement of claim were admitted in the defence of the first defendant and the amended defence of the second defendant. In so far as they were not admitted, they were proved to my satisfaction by the plaintiff's surveyor, but he added that, when he visited the house six weeks ago, the breaches had in substance been remedied except for the renewal of a dilapidated boundary fence and the treatment of rot, which was visible by the window of the lower ground floor kitchen. It appears that in the course of the spring and summer of this present year a sum of £217 has been spent on paintwork and repairs.

It is to be noted that the pleading delivered on behalf of the second defendant in June, 1955, was a defence and nothing else: there was no counterclaim for relief against forfeiture. The amended pleading delivered in February, 1956, and the pleading then delivered on behalf of the first defendant, both included such a counterclaim. On behalf of the plaintiff it was contended that, having regard to the nature of the original defence delivered on behalf of the second defendant and the reply thereto, there was no jurisdiction to grant relief against the forfeiture resulting from those pleadings, and, with the assent of counsel on both sides, the argument was limited to that issue, on the understanding that if I decided it in favour of the defendants, I should then hear argument on the question whether relief should be granted in respect of the forfeiture related to the breaches of the express covenants contained in the lease.

For the purposes of the issue now under consideration, the terms of the defence delivered on behalf of the second defendant in June, 1955, are of crucial importance, and as the pleading is short, I quote it in full: "Defence of the second defendant:

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[40] [1902] A.C. 465.

"1. This defendant admits that she was appointed an executrix "of the will of Gertrude Annie Sampson, deceased, as alleged in "paragraph 8 in the statement of claim. 2. This defendant "denies that she has committed the breaches of covenant specified in paragraph 9 of the statement of claim or any breach of "any covenant. 3. Save and except for the admission herein "contained this defendant denies each and every allegation in "the statement of claim as if the same were specifically set out "and traversed seriatim."

I expressly refrain from mentioning the name of counsel who drafted and signed this pleading. Mr. Hames, who conducted the defendants' case before me with tenacity and ability, was not responsible for it, and the solicitors who are now acting for both defendants were not then acting for the second defendant.

The first point may be described as a question of construction. Relying on the decision of the Court of Appeal in *Wisbech St. Mary Parish Council* v. *Lilley*,[1] Mr. Hames contended that denial by a tenant of his landlord's title must be clear and unambiguous if it was to be the basis of a claim for forfeiture, and that the pleading in question did not satisfy that condition. It was argued that the form of the denial contained in paragraph 2 impliedly admits the existence of the lease and of the covenants, the breaches of which are denied, and that the comprehensive denial contained in paragraph 3 must be construed in such a way as not to conflict with the admission implied in paragraph 2. In my judgment, however, the wording of paragraph 3 is too clear and too specific. Only one admission is excluded from the general denial, and that admission must obviously be the admission contained in paragraph 1. To give effect to Mr. Hames' contention would involve adding the letter "s" to the word "admission" in paragraph 3 or substituting some such expression as "save as aforesaid." In my judgment, the denial of the lessor's title contained in paragraph 3 is in clearer and more direct form than the denial held in *Kisch* v. *Hawes Brothers Ltd.*,[2] to be involved in the plea that the defendants were in possession.

Apart from the view which, for my part, I hold as to the meaning of the defence, there is another reason why I cannot give effect to Mr. Hames' contention. Those advising the defendants in August, 1955, no doubt realized the danger created by the pleading delivered on June 15, 1955, and they accordingly sought leave to withdraw it. If Master Grundy's order giving them such leave had not been varied, there would be much force in an argument to the effect that the damage (if any) had been undone. But Pearson J. did vary the order and his refusal to allow the second defendant to withdraw her defence indicates, in my opinion, an intention on his part not to allow the plaintiff to be deprived of a right which had already crystallized, namely, to treat that defence as containing a denial of the lease. If I were now to hold that the defence did not involve a denial of the lease, I should be giving a decision which would be contrary to the spirit, if not the letter, of the decision of Pearson J., and I decline to do so.

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[1] [1956] 1 W.L.R. 121; [1956] 1 All E.R. 301.

[2] [1935] Ch. 102.

Logically, the next point to consider is Mr. Hames' contention that the denial of the lease contained in the pleading was made by mistake or, alternatively, was not intended, and that in the circumstances the second defendant should not be regarded as bound by it. For the plaintiff, Mr. Scarman was prepared to accept that the denial was a mistake by counsel, by which he meant that counsel unfortunately overlooked the possible consequence of a pleading in the form drafted by him. There is, in my view, a risk of confusion in the use of the word "mistake" in this connexion. So far as the evidence goes, there is nothing to show that counsel did not intend to draft the pleading in the form in which it was delivered, or that he was in any way misled. The instructions sent to him were produced at the hearing before me by the solicitor who then acted for the second defendant, and it is clear from them that in the solicitor's view there was no defence to the claim that the covenants in the lease had been broken. Counsel was asked to draft a defence "if only to stay the hand of the ground landlord whilst efforts "are made to induce Sampson to do something in the matter." The defence certainly achieved the object of keeping the plaintiff out of possession but, as already stated, counsel overlooked the fact that, if and when the day of reckoning came, the pleading which he drafted might prove fatal. To avoid confusion, I should prefer to call this a lapse rather than a mistake on the part of counsel, and I cannot accept Mr. Hames' submission that "counsel's mind did not go with his signature." In this connexion reference was made on behalf of the plaintiff to the decision of the Court of Appeal in *Barrow* v. *Isaacs & Son*,[3] in which Lord Esher M.R. emphasized[4] the difference between mere forgetfulness and mistake. In my view, counsel's lapse was an instance of the former and not of mistake.

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[3] [1891] 1 Q.B. 417.

[4] Ibid. 420.

Alternatively, it was contended that the form of the defence was given to it "in the teeth of the second defendant's express "instructions" that the asset in question forming part of Mrs. Sampson's estate was to be preserved for the benefit of her children. In support of this contention I was referred to *Neale* v. *Gordon Lennox*.[5] In that case the plaintiff was only prepared to consent to a proposed order if a certain condition were satisfied. Counsel appearing for her omitted to have this condition included when agreeing to the proposed order, and the House of Lords held that in the circumstances the plaintiff was not bound by the agreement which her counsel had made. In my judgment, that case is plainly distinguishable from the present case, and I am quite unable to hold that counsel who drafted the second defendant's defence was disregarding specific instructions. I am not satisfied that any specific instructions beyond those which I have referred to were given to counsel; still less that any specific instructions were given by the second defendant herself. I was also referred to the decision of the Court of Appeal in *Matthews* v. *Munster*,[6] and of Kekewich J. in *Lewis's* v. *Lewis*.[7] Of these two decisions the former does not, in my opinion, assist the defendants in the present case, and the latter was expressly based on the existence of a misunderstanding. For the reasons already given, I am of opinion that there was no misunderstanding in the present case and, accordingly, the decision of Kekewich J.[7] is not applicable.

Before I deal with the complications arising out of the fact that the two defendants are the executors of Mrs. Sampson, I should perhaps state that if the second defendant had been in the position of a sole lessee in June, 1955, when her defence was delivered, there would have been no answer to the plaintiff's claim as soon as the reply was delivered. Apart from the decision in *Kisch* v. *Hawes Brothers Ltd.*,[8] reference may be made to *Barton* v. *Reed*,[9] and a discussion of that case in an article in 76 Solicitors' Journal, p. 73.

The proposition in regard to executors put forward on behalf of the plaintiff was that when one of two executors by his defence disputes the landlord's title, the other executor is bound by the consequences unless he has himself put in a defence admitting the title, in which event the principle contained in *Midgley* v. *Midgley* [10] would be applicable, namely, that the court will have regard to the plea most favourable to the deceased's estate. It was argued that in June, 1955, when the second defendant delivered a defence in which the plaintiff's title as landlord was denied, the first defendant having entered no appearance and indeed having suffered judgment to be entered by default, the plaintiff was entitled to forfeit the term and did so by her reply delivered on June 29.

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[5] [1902] A.C. 465.
[6] (1887) 20 Q.B.D. 141.
[7] (1890) 45 Ch.D. 281.
[8] [1935] Ch. 102.
[9] [1932] 1 Ch. 362.

In Bacon's Abridgement, 6th ed. (1807), vol. 3, p. 30, there appears this passage: "Hence it hath been adjudged, that if "the testator dies possessed of a lease for years, and having made "two executors, one of them grants all his interest to a stranger, "that the whole term passes, for each had an entire authority "and interest different from other joint-tenants." In *Simpson* v. *Gutteridge* [11] the Vice-Chancellor said [12]: "Where one of the "several joint tenants, or tenants in common, executes a deed, "it passes only the share of the party so executing; but several "executors are considered only as one, and a gift, sale, surrender, "payment, release, or judgment confessed, by one executor, is "as effectual as if all of them had joined. In *Dyer* [23b] it is "said, 'If two executors have a term, and one grants to a "'stranger all that belongs to him, the whole term passes "'inasmuch as each of them has an entire authority and interest "'in the term as executor; but of other joint-tenants of a term "'it is otherwise; so there is a diversity.' This doctrine has "been constantly recognized. Each executor has an entire "interest in the term."

Mr. Scarman did not concede that two executors of a lessee are to be regarded as joint tenants, but he went on to contend that in any event, if such executors are in any sense joint tenants, they are, so to speak, joint tenants sui generis as indicated in the passages which I have just quoted.

On the other hand, Mr. Hames argued that for a denial of title to give rise to forfeiture the denial must be made by a lessee and that one of two executors could not be treated as the lessee for this purpose. In his submission, two executors of a lessee are joint tenants and accordingly a denial or disclaimer can only effectively be given by them both. In regard to joint tenants who are not executors of a lessee, it is no doubt true that "in the absence of express words in the lease, or of

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[10] [1893] 3 Ch. 282.
[11] (1816) 1 Madd. 609.
[12] Ibid. 616.

"authority, one of two joint lessees cannot surrender rights held "jointly before the full period of the lease has run": see *Leck and Moorlands Building Society* v. *Clark*.[13] The same principle has been applied in a case relating to a disclaimer under a will: *In re Schar*.[14] But no case was cited to me in which the decision in *Simpson* v. *Gutteridge*[15] was questioned or overruled, and unless the Administration of Estates Act, 1925, has had that effect, I am of opinion that the proposition put forward by Mr. Scarman is correct.

Section 2 (2) of the Act of 1925 provides (so far as material) as follows: "Where as respects real estate there are two or more "personal representatives, a conveyance of real estate devolving "under this Part of this Act shall not . . . be made without the "concurrence therein of all such representatives or an order of "the court." Real estate is defined in section 3, and plainly includes an interest in a term. The definition of "conveyance" in section 55 is of importance, and is in the following terms: "'Conveyance' includes a mortgage, charge by way of legal "mortgage, lease, assent, vesting, declaration, vesting instru-"ment, disclaimer, release and every other assurance of property "or of an interest therein by any instrument, except a will."

On behalf of the defendants it was argued that if, contrary to their contentions, the second defendant's defence delivered on June 15, 1955, involved a denial of the plaintiff's title, it was a disclaimer and therefore within the definition of "conveyance" set out above. It is true that the denial by a tenant of his landlord's title is often referred to as a disclaimer, and, indeed, in the reply of the plaintiff delivered on June 29 it was alleged that the second defendant had by her defence disclaimed and disputed the plaintiff's title as her landlord. On this point I was referred to *Doe* d. *Ellerbrock* v. *Flynn*[16] and *Doe* d. *Graves and Downe* v. *Wells*.[17]

In my judgment, the type of disclaimer contemplated in section 55 of the Act of 1925 is one which is, so to speak, recognizable and identifiable as a disclaimer. In other words, the definition contemplates a document which would in normal course either start with the words "This disclaimer . . ." or at least contain the word "disclaim." It would, in my view, be a misuse of language to describe a defence delivered in an action as a disclaimer merely because that defence contained a denial of the landlord's title. Moreover, there is force in Mr. Scarman's argument that all the instruments included in the definition of "conveyance" are instruments which can properly and lawfully be executed, provided that they have the concurrence of all the personal representatives. Assuming that a lessee's denial of his landlord's title can be described as a disclaimer, it is not a disclaimer which can properly or lawfully be executed, even if all the executors concur in it, since a disclaimer of that type involves a breach of the condition which the law "tacitly "annexes" to every lease "that, if the lessee do any thing "which may affect the interest of his lessor, the lease shall be "void, and the lessor may re-enter": see *Doe* d. *Ellerbrock* v. *Flynn*.[18] In my view, this so-called disclaimer is in essence a repudiation of the tenancy and I hold that the defence of the second defendant delivered on June 15, 1955, was not a conveyance within the meaning of section 2 (2) and section 55 of the Act of 1925.

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[13] [1952] 2 Q.B. 788.

[14] [1951] Ch. 280.

[15] 1 Madd. 609.

[16] (1834) 1 C.M. & R. 137.

[17] (1839) 10 Ad. & E. 427.

I have not yet referred to the effect (if any) of the judgment obtained by default against the first defendant on May 27, 1955. In *Gill* v. *Lewis* [19] it was held that to obtain an effective judgment for possession against joint tenants judgment must be obtained against both of them, and Mr. Hames relied on that decision as showing that the judgment entered against the first defendant in the present case was of no effect. But assuming this point in his favour, it does not, in my view, affect the position which resulted from the second defendant's defence and the plaintiff's reply. Although the judgment against the first defendant was set aside in August, it was then too late, and the plaintiff's rights had accrued. It is only right to add that Mr. Scarman did not rely on the judgment against the first defendant as an essential element in the establishment of his case.

In my judgment, therefore, the claim for possession succeeds. There is also a claim for mesne profits and damages, based on the footing that forfeiture occurred on June 29, 1955, since which date the defendants have wrongfully remained in possession of the house. The period involved is nearly two and a half years, and on the evidence before me I think that a reasonable sum in respect of mesne profits would be £350. As regards damages, most of the disrepair has been made good, but the boundary fence and the internal rot still require attention and in respect of them I award a further sum of £50. There will, accordingly,

[18] 1 C.M. & R. 137.

[19] [1956] 2 Q.B. 1.

be judgment for the plaintiff for possession and for the sum of £400.

Application was then made on behalf of the defendants to argue that they were entitled to apply for relief from forfeiture under section 146 of the Law of Property Act, 1925,[20] and the action was listed for further argument on that point.

January 13, 1958. *J. H. Hames* for the defendants. It is regretted if the court was given the impression that application would not be made for relief from forfeiture under section 146 of the Law of Property Act, 1925, and the defendants now seek leave to make such application. [Reference was made to *In re Viscount Portman (No. 2)*.[21]]

L. G. Scarman Q.C. opposed the application.

ASHWORTH J. gave leave to apply.

J. H. Hames. The court has jurisdiction to grant relief from forfeiture in this case. The denial of the landlord's title gives rise to a right of forfeiture, and it has been held that the denial was a breach of a condition annexed by law to the lease; a "proviso or stipulation in a lease" may apply to a condition not specifically mentioned in the lease, and may also apply to one annexed to it by operation of law: compare section 132 of the Law of Property Act, 1922. The proceedings by the landlord, therefore, fall within section 146 (1) of the Act of 1925 and the defendants are entitled to apply for relief under section 146 (2). [Reference was also made to *Doe* d. *Ellerbrock* v. *Flynn*.[22]] Parliament intended to give the right to apply for relief from forfeiture to tenants in all cases of breach of covenant when the reversion is unharmed. The denial of the landlord's title has not harmed the reversion, nor have the defendants done anything that cannot be put right.

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[20] Law of Property Act, 1925, s. 146: "(1) A right of re-entry or "forfeiture under any proviso or "stipulation in a lease for a breach "of any covenant or condition in the "lease shall not be enforceable, by "action or otherwise, unless and until "the lessor serves on the lessee a "notice—(*a*) specifying the particular "breach complained of; and (*b*) if "the breach is capable of remedy, "requiring the lessee to remedy the "breach; and (*c*) in any case, requiring the lessee to make compensation "in money for the breach; and the "lessee fails, within a reasonable "time thereafter, to remedy the "breach, if it is capable of remedy, "and to make reasonable compensation in money . . . (2) Where a "lessor is proceeding, by action or "otherwise, to enforce such a right "of re-entry or forfeiture, the lessee "may . . . apply to the court for "relief . . ."

[21] [1925] Ch. 294.

[22] 1 C.M. & R. 137.

L. G. Scarman Q.C. Section 146 of the Law of Property Act, 1925, does not apply and there is no jurisdiction to grant relief. The right of forfeiture in this case did not arise under " any proviso " or stipulation in a lease," but upon the denial of the tenancy and as the legal consequence of the relationship of landlord and tenant. Further, the impossibility of compliance by the landlord with the provisions as to notice and requiring the breach to be remedied or the lessee to make compensation in section 146 (1) (*a*), (*b*) and (*c*) show that a case such as this is quite outside the section.

J. H. Hames, in reply, referred to *Driscoll* v. *Church Commissioners for England.*[23]

ASHWORTH J. In this case I gave judgment in December last on what at that time I believed to be in effect the only issue before me on the assumption that my decision was to be actually embodied in my judgment. In other words, I was under the impression that if I decided that by the defence delivered on behalf of the second defendant there had been a denial of the landlord's title, neither defendant would seek to persuade me to grant relief against the forfeiture thereby arising. Mr. Hames has applied today for relief against forfeiture, and I am indebted to him for the frankness with which he has conceded that by inadvertence, possibly on his part, he did not make it clear at the previous hearing that he still hoped to obtain relief against forfeiture even if the court should be against him on the issue then under discussion. My own recollection is fortified by the fact that Mr. Scarman, for the plaintiff, agrees with the statement of that recollection which I have just made.

However, I thought it right to hear the application notwithstanding opposition on behalf of the plaintiff, though in doing so I was conscious that possibly I was stretching the discretion of the court beyond normal limits. But I confess that I had in mind that the defendants in this case may well feel that they have been distinctly unlucky in their experience of courts of law, and I should not like them to feel that one further nail was driven into the coffin of their case because of some misunderstanding which occurred at the previous hearing; and I have therefore heard Mr. Hames on this matter.

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[23] [1957] 1 Q.B. 330; [1956] 3 All E.R. 802.

He applies under section 146 of the Law of Property Act, 1925, for relief from forfeiture, and he fairly stated that his researches have not disclosed to him any case in which, in similar circumstances, relief has indeed been sought, let alone granted. He prays in aid the fact that there is no express decision to the effect that the court will not grant relief in such circumstances. I feel, however, that there is a weighty counter to that last contention because this issue came before the courts in the 1920s and again in the 1930s in *Barton* v. *Reed*[24] and in *Kisch* v. *Hawes Brothers Ltd.*,[25] to both of which cases I referred in my previous judgment; and it would seem to me astonishing if this remedy had been open, for example, in *Barton* v. *Reed*,[26] where counsel for the plaintiff expressly conceded that the defendants should be at liberty to withdraw their defence rather than to amend it, because otherwise the defendants were in a hopeless position. If relief from forfeiture could have been granted in those circumstances, that would have been a far less oblique way of reaching the desired object.

But in my view, apart from those features of the case, section 146 does not apply. The facts must be borne in mind. In this action the plaintiff brought proceedings for breaches of covenant and for non-payment of rent. In the defence delivered by the second defendant the landlord's title, as I have held, was put in issue by denial. The result was that the landlord, as I have held, was entitled by way of reply to say that the plea amounted to a disclaimer or denial of the landlord's title, and that thereupon there arose a forfeiture. The sidenote to section 146 is " Restrictions on and relief against forfeiture of leases " and under-leases," and it is quite apparent that this is a section dealing with the procedure for forfeiture arising in cases where a landlord is seeking a right of re-entry or forfeiture under a proviso or stipulation in a lease for a breach of any covenant or condition in the lease, and that the section is saying that that right shall not be enforceable unless certain preliminary conditions are satisfied. It appears to me plain beyond argument that it would have been quite impossible for the landlord in this case to comply with those conditions—nor does the section contemplate the application of those conditions to such a situation as happened here. In my judgment, this is not a forfeiture under any proviso or stipulation in a lease at all; it is a forfeiture which arises by operation of law; and I think that some of the earlier cases—in particular *Doe* d. *Ellerbrock* v. *Flynn* [27]—cited in my earlier judgment, justify this view.

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[24] [1932] 1 Ch. 362.

[25] [1935] Ch. 102.

[26] [1932] 1 Ch. 362.

If the forfeiture does occur (as I have held it did) by reason of the denial of the lease and the title, it seems to me strange to suggest that a lessee may come to the court notwithstanding that denial, and ask for relief on the footing that the lease does exist. While not an impossible one, it appears to me a strange result; and, having regard to the fact that on no previous occasion (so far as the researches of counsel go) has any successful application for relief in this type of case been made, I am not prepared to be the pioneer in the matter or to grant relief in this case. The application, therefore, is refused.

Judgment for the plaintiff.

Solicitors: *Murray, Hutchins & Co.; Wilders & Sorrell.*

J. F. L.

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[27] 1 C.M. & R. 137.

HOLLAND *v.* ONG.

C. A.
1958
Feb. 13, 14, 17.
Hodson and Pearce L.JJ., and Upjohn J.

Landlord and Tenant — Rent restriction — Premises within the Acts— Rateable value—Ascertainment of rateable value—London unfurnished flat and garage—Flat alone occupied by tenant—Property assessed in valuation list as one hereditament rated at £76—On tenant's proposal property reassessed separately, flat being valued at £40 — Application by landlord for reassessment — Meaning of "hereditament" — Value "shown in" valuation list — Rent Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 25), *s.* 11 (1), *Sch.* 5, *paras.* 1 (*b*), 2 (1).

Property in London consisting of an unfurnished flat and a garage had formerly been assessed for rating as one hereditament at £76. The tenant, who occupied only the flat, made a proposal for separate valuations of the flat and garage, and pursuant to section 40 of the Local Government Act, 1948, the local valuation court before November 7, 1956, altered the valuation list by assessing the flat and garage as separate hereditaments, the flat being valued at £55 gross and £40 net, which would keep the flat within the control of the Rent Act, 1957.

The landlord applied to the county court for an apportionment of the rateable value of the flat under paragraph 1 (*b*) of Schedule 5 to the Act of 1957.[1] The tenant opposed the application, and the judge dismissed it, holding that the apportionment by the local valuation court, on the proposal by the tenant, was an alteration "so as to vary" the rateable value of a hereditament within paragraph 2 (1) of Schedule 5,[1] and that there was therefore no jurisdiction to apportion. On appeal by the landlord:—

Held, that the flat fulfilled the definition of "hereditament" in section 68 of the Rating and Valuation Act, 1925; that, although it had been formerly assessed as part of a composite hereditament and no separate assessment had then been made upon it, it was then a "hereditament shown in the valuation list" within the meaning of paragraph 2 (1) of Schedule 5 to the Act of 1957; that the valuation list had been altered "so as to vary" the rateable value of the hereditament; and that paragraph 2 (1) accordingly applied, and the appeal must be dismissed.

APPEAL from Judge Howard, sitting at West London County Court.

On November 25, 1957, Judge Howard upheld a decision by Mr. Registrar Freeman Coutts, and dismissed an application by Stephen Holland, the landlord of premises at 19, Ennismore Mews, for an apportionment of their rateable value under Schedule 5, paragraph 1 (*b*) to the Rent Act, 1957.[1]

The premises consisted of a flat (of which Sidney Frank Ong was the tenant) and a garage, which had been jointly rated as one hereditament at £76 and so appeared in the valuation list.

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[1] Rent Act, 1957, Sch. 5: "1. In "relation to any premises in England "or Wales, any reference in this Act "to the rateable value on a particular "date (hereinafter referred to as the "'date of ascertainment') shall sub- "ject to the following provisions of "this Part of this Schedule be con- "strued—(*a*) if the premises are a "hereditament for which a rateable "value is then shown in the valua- "tion list, as a reference to the rate- "able value of the hereditament, or "where that value differs from the "net annual value, the net annual "value thereof, as shown in the "valuation list on that date; (*b*) if "the premises form part only of such "a hereditament, as a reference to "such proportion of the said rateable "value or net annual value as may "be agreed in writing between the "landlord and tenant or determined "by the county court. . . . 2. (1) The "following provision shall have effect "for the purposes of subsection (1) of "section eleven of this Act or an order "made under subsection (3) thereof, "that is to say, where after the date "of ascertainment the valuation list "is altered so as to vary the rateable "value of a hereditament, and the "alteration has effect from a date not "later than the date of ascertainment "and is made in pursuance of a "proposal to which this paragraph "applies, the rateable value on the "date of ascertainment of any "dwelling-house consisting of or "wholly or partly comprised in that "hereditament shall be ascertained "as if the amount of the rateable, or "as the case may be net annual, "value of that hereditament shown "in the valuation list on the date of "ascertainment had been the amount "of that value shown in the list as "altered. . . ."

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On the application of the tenant the list was altered by the valuation court before November 7, 1956, and appeared in the valuation list as first floor flat, gross £55, net £40; garage £60 gross and £44 net. The tenant resisted the apportionment under paragraph 1 (*b*) of Schedule 5 on the ground that the valuation list had at the relevant date been altered so as to vary the rateable value of the property, and therefore paragraph 2 of Schedule 5 [1] applied. The judge held that there was no jurisdiction to apportion the £76 since the effect of the alteration had been to vary the assessment with retrospective effect.

The landlord appealed.

R. E. Megarry Q.C. and *A. P. Graham-Dixon* for the landlord. The landlord asks that this case shall go back to the county court judge for an apportionment of the rateable value of the flat and garage under paragraph 1 (*b*) of Schedule 5 to the Act of 1957. It is submitted that the requirements of paragraph 2 are not complied with. There has not been a variation of the rateable value of the hereditament. The splitting of the £76 is not a process under paragraph 2. It is not a variation of the rateable value of a hereditament. The judge claimed that paragraph 7 supported his judgment, but it is submitted that it does not. The basis of his judgment was that anything is a hereditament which is capable of becoming one, but here there is nothing in the least capable of being valued as a hereditament. It is for the tenant to establish that there has been a variation, otherwise he does not bring paragraph 2 into operation. One has to look at what is on the valuation list, and that is the unit of assessment. Nothing else matters. Until it is altered the list must be accepted: see *North Eastern Railway Co.* v. *York Union.*[2]

Roy Wilson Q.C. and *Maurice Ahern* for the tenant. The whole of the argument for the appellant is based on a fallacy. He said that the case depends upon the valuation list. The composite hereditament ought not to have been in the list at all. There is no power to assess the composite hereditament as one hereditament. As soon as the rating authority knew that the flat was a separate hereditament, it ought to have been in the valuation list as such. The words of section 68 of the Rating and Valuation Act, 1925, "are or may become liable to any "rates" mean "liable to be rated." A rate means a rate in general. It is only the occupier who becomes liable to be rated, not the premises. If the valuation list is wrong, it is in the discretion of the court to say so and it must be altered. It has been altered. The flat is already liable to rates and in proof of that it was not necessary to go beyond the valuation list. The registrar was right in his very lucid reasoning when he said that the valuation had been varied from an undetermined part of £76 to £40. [Reference was made to *Temple* v. *National Mutual Life Association of Australasia Ltd.*[3] and *Reg.* v. *St. George's Union.*[4]]

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[1] See ante, p. 426.

[2] [1900] 1 Q.B. 733.

HODSON L.J. This is an appeal from a judgment of Judge Howard, given on November 25, 1957, upholding the decision of Mr. Registrar Freeman Coutts, who had dismissed the application of the landlord for an apportionment of the rateable value of 19, Ennismore Mews. The property consists of a flat and garage which were formerly rated as one hereditament at £76. The tenant of the flat resisted the apportionment on the ground that the valuation list had at the relevant date been altered, so as to vary the rateable value of the property and divide the assessment between the first floor flat and the garage. The county court judge held that there was no jurisdiction to apportion the £76, since the effect of the alteration had been to assess the flat at £40 and the garage at £44 with retrospective effect. The Rent Act, 1957, by section 11, released from control dwelling-houses in London of which, on November 7, 1956, the rateable value exceeded £40. The tenant had obtained the alteration by making a proposal to that end pursuant to section 40 of the Local Government Act, 1948, and on September 24, 1957, the local valuation court gave notice of its decision. This notice shows the facts upon which the case was argued.

It had been agreed between the parties to the application in the court below that no evidence should be tendered and that the court should be asked to give its decision on the point of law which emerged from these facts which appeared on the face of the document, it being further agreed (as it had been pleaded) that the tenant had made his application in time for any alteration to have effect before the material date, November 7, 1956. The decision of the valuation court described the property as formerly assessed at 19, Ennismore Mews as "first floor flat and

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[3] [1955] 2 Q.B. 461; [1955] 2 All E.R. 758.

[4] (1871) L.R. 7 Q.B. 90.

"garage (south)"; gross value of the hereditament, £100; rateable value £76; description and value proposed: "first floor flat, "gross £55; net £40; garage (south)," shown separately, £60 gross and £44 net.

The question to be determined on this appeal depends on the terms of paragraphs 1 and 2 of the Fifth Schedule to the Act of 1957. [His Lordship read the material parts of the paragraphs and continued:] If paragraph 2 (1) is applicable to this case, the tenant is right in his application that the rateable value of the flat is £40 and does not fall to be ascertained by apportionment of the £76. No doubt paragraph 2 (1) is primarily directed to a straightforward case of the variation of the value originally appearing in the valuation list attached to the description of a particular hereditament. In this case it would be primarily directed to a variation of the original figure of £76 to some other figure.

The question to be determined is whether the language of the sub-paragraph is apt to embrace the splitting operation which has here occurred. The flat in question fulfils the definition of "hereditament" in section 68 of the Rating and Valuation Act, 1925, to which the Local Government Act, 1948, s. 144, directs attention for definition purposes: "'Hereditament' means any "lands, tenements, hereditaments or property which are or may "become liable to any rate in respect of which the valuation list is "by this Act made conclusive." "Hereditament" is a very wide word, and there seems to be no difficulty, on the language of the definition section by itself, in applying that to this flat. I should refer back to section 20 of the Act of 1925, because of the reference in the definition to the operation of the valuation list which is by this Act made conclusive. Section 20 (1) provides: "For the purpose of every rate as defined by this Act, "and for the purpose of determining the annual value of "premises under the Licensing (Consolidation) Act, 1910, . . . "the valuation list as in force at the time when the rate is "made or the value of the premises is to be determined, shall "be conclusive evidence of the values of the several hereditaments included in the list."

To fulfil the definition is not enough, however, for, in order that the paragraph may operate, the flat must be a hereditament shown in the valuation list. What was shown in the valuation list before alteration was the flat plus garage, according to the description which I read from the notice of the decision, and it was not until after alteration that the flat was separately shown. The question is: Can the flat be said to be shown in the valuation list when it is shown, not as a separate entity, but as part of a composite hereditament? It was part of a larger hereditament, and although its rateable value was not actually shown and would therefore only be ascertained by apportionment, it can, I think, properly be said to be shown without unduly straining the language of the section.

Some assistance is to be obtained from the decision of the Court of Appeal in *Temple* v. *National Mutual Life Association of Australasia Ltd.*[1] That was a decision on section 7 (2) and (3) of the Rent Act of 1939. Subsection (2) reads: "In relation "to any dwelling-house of which the rateable value on the "appropriate date" [April 6, 1939] "was not on that day "separately assessed, any reference in the preceding provisions "of this Act to the rateable value on the appropriate day shall "be construed as a reference to such proportion of the rateable "value on that day of the property in which the dwelling-house "is comprised as may be apportioned to the dwelling-house by "the county court in accordance with the provisions of sub-"section (3) of section twelve of the Increase of Rent and "Mortgage Interest (Restrictions) Act, 1920."

Subsection (3) reads: "In relation to any dwelling-house "first assessed after the appropriate day, any reference in the "preceding provisions of this Act to the rateable value on the "appropriate day shall be construed as a reference to the rate-"able value on the day on which the dwelling-house was first "assessed."

In deciding when the dwelling-house was first assessed the court came to the conclusion that it was so assessed when the assessment was made upon the composite whole of which the particular item formed part although no separate assessment was made upon it until a later date. Mr. Megarry pointed out on behalf of the landlord that "shown" is not the same as "assessed," and contended that though it may be quite right to say that a part may be said to be assessed when the complex of which it forms part is assessed, yet you cannot produce the result that this flat was ever shown on the valuation list before the list was altered. While recognizing the force of this submission, I reject it. The flat was certainly shown in the list even though not separately included, and the whole of which it formed part was shown by description with a rateable value which covered both component parts. So that, so far as that part of the submission on behalf of the landlord is concerned, I agree with the registrar and with the county court judge that the landlord's submission fails.

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[1] [1955] 2 Q.B. 461; [1955] 2 All E.R. 758.

There is a further submission on behalf of the landlord that, even if the flat is shown in the valuation list, the list had not been altered so as to vary its rateable value. It seems to me that he would have to argue, so as effectively to exclude the operation of the section, that it could not be altered so as to vary the rateable value; but it is unnecessary to determine that, because it is sufficient for the purpose of this case to say that I agree with the court below that there can be said here to have been a variation from the original assessment of £76, and although I concede that there is difficulty in regarding the known figure of £40 as an alteration from an unknown figure, part of the £76, notionally to be attributed to the flat, yet the alteration of the assessment of the premises as a whole from £76 to two separate assessments of £40 for the flat and £44 for the garage may, in my opinion, fairly be regarded as by itself an alteration varying the rateable value of the hereditament, that is to say, of the flat.

I would accordingly dismiss the appeal.

PEARCE L.J. I agree, and for the reasons which my Lord has given.

UPJOHN J. I also agree.

Appeal dismissed.
Leave to appeal to the House of Lords refused.

Solicitors: *Bircham & Co.; Ouvry & Co.*

A. W. G.

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Donovan J.

GRAHAM *v.* C. E. HEINKE & CO. LTD.

[1956 No. G. 2130.]

Practice and Procedure—Payment into court—Notice—Form—Factories Act and common law claims—Whether causes of action must be specified—R.S.C., Ord. 22, *r.* 1 (2).

Legal Aid—Costs—Means of assisted person—Whether damages awarded to him to be taken into consideration.

R.S.C., Ord. 22, r. 1 (2), provides: "Where . . . money is paid "into court in satisfaction of one or more of several causes of "action the notice shall specify the cause or causes of action in "respect of which payment is made . . ."

The plaintiff claimed damages for personal injuries alleged to be due to the defendants' negligence at common law and breach of statutory duty. Before the defence was delivered the defendants made a general payment of £1,000 into court without specifying the cause of action in respect of which the payment was made. The plaintiff did not take the money out, the action proceeded to trial and the judge awarded the plaintiff £760 damages. The defendants then applied for the costs of the action after the date of payment in; the plaintiff resisted the application on the ground that the payment in had to be regarded as a nullity as it did not comply with Ord. 22, r. 1 (2):—

Held, (1) that Ord. 22, r. 1 (2), contemplated cases where there were several causes of action giving rise to several independent claims for damages, and not a case, such as the present, where although there might be two causes of action, they were really alternative in that only one award of damages was possible under either cause of action, and, therefore, the defendants were not required by Ord. 22, r. 1 (2), to specify the cause of action in the notice of payment into court.

(2) That, accordingly, the defendants should have the costs after the date of payment in; and, further, that in the circumstances any excess thereof over the costs up to that date should be paid to the defendants out of the £1,000 in court notwithstanding that the plaintiff was legally aided.

Nolan v. *C. & C. Marshall Ltd.* [1954] 2 Q.B. 42; [1953] 2 All E.R. 389 applied

ACTION.

On December 5, 1956, the plaintiff, Rueben Graham, issued a writ claiming damages against the defendants, C. E. Heinke & Co. Ltd., for personal injuries sustained while in the defendants' employment, due to their negligence and/or breach of statutory duty. The statement of claim was delivered on the same day and alleged that the plaintiff's finger-tips were crushed in the rollers of a rubber processing machine which he was operating, and that the injuries were due to the negligence and/or breach of statutory duty on the part of the defendants, and the particulars alleged, inter alia, a breach of section 14 of the Factories Act, 1937, and an unsafe system of work.

On December 28, 1956, before the delivery of the defence, the defendants paid into court £1,000 and their notice of payment in read: "Take notice that the defendants, Heinke & Co. Ltd., "have paid into court £1,000 and say that that sum is enough to "satisfy the plaintiff's claim." The plaintiff did not take out that sum.

By their defence, the defendants denied that they were negligent or in breach of statutory duty, and alleged that the accident was caused by the plaintiff's own negligence or, alternatively, that the plaintiff's negligence contributed to the accident.

At the trial of the action it was conceded on behalf of the defendants that there was a breach of section 14 of the Factories Act, 1937, and the case proceeded solely on the issues of contributory negligence and damages. Donovan J. found in the plaintiff's favour on the claim, held that he was not guilty of any contributory negligence, and awarded him £760 damages.

The defendants applied for the costs of the action from the date of payment in. The plaintiff, who was legally aided, resisted the application on the ground that the notice of payment in should be regarded as a nullity, as it did not comply with the terms of R.S.C., Ord. 22,[1] since it did not specify the cause of action in respect of which the payment was made.

Leonard Halpern for the plaintiff. The plaintiff's claim for damages was based on negligence at common law and breach of statutory duty. There are clearly two separate causes of action and therefore R.S.C., Ord. 22, r. 1 (2), requires the notice of payment into court to specify in respect of which cause of action the payment is made. As the notice did not specify the cause of action, it is a nullity and costs should follow the event. The purpose of the rule is to save embarrassment to a plaintiff. Even a technical breach of the rule still makes the notice of payment in a nullity, and the general discretion which a judge has as to costs does not mean that a failure to comply with a technical step can be overlooked. "If the defendant desires to make a "general payment in he should apply for leave to do so by summons returnable before a master": see note to Ord. 22, r. 1 (2), at p. 526 of The Annual Practice, 1958. The point whether notice of payment in should specify whether it is made in respect of the common law or the statutory claim was left open in *Nolan* v. *C. & C. Marshall Ltd.*[2] [Reference was made to *Murfin* v. *United Steel Companies Ltd.*,[3] *London Passenger Transport Board* v. *Upson*[4] and *Caswell* v. *Powell Duffryn Associated Collieries Ltd.*[5]]

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[1] R.S.C., Ord. 22, r. 1: "(1) In any "action for a debt or damages . . . "the defendant may at any time after "appearance upon notice to the plaintiff pay into court a sum of money "in satisfaction of the claim or "(where several causes of action are "joined in one action) in satisfaction "of one or more of the causes of "action; . . . (2) Where the money "is paid into court in satisfaction of "one or more of several causes of "action the notice shall specify the "cause or causes of action in respect "of which payment is made and the "sum paid in respect of each such "cause of action unless the court or "a judge otherwise order."

Apart from authority, breach of statutory duty is the creation of a new cause of action where none existed before. Each has been classified as a separate tort. Where there are several issues before the court, such as issues of liability under two heads and issues of damages, there is no authority which takes away the judge's discretion to award a plaintiff the costs of the issues on which he has succeeded, even though he has failed to recover more damages than the money paid into court: see note to Ord. 22, r. 6, General rules as to costs, at p. 535 of The Annual Practice, 1958. [Reference was made to *Findlay* v. *Railway Executive*.[6]]

John Stocker for the defendants. Payment in was made before the defence was delivered, so at that stage there were no formulated issues between the parties. Although it may strictly be said that negligence and breach of statutory duty are two separate causes of action, nevertheless one has to consider the effect which Ord. 22, r. 1 (2), would have if they were considered to be different causes of action within the meaning of that rule. In every such case defendants wishing to pay money into court would have to apply to the court to pay in a lump sum to cover both causes of action, because, if they did not, either they would have to pay in twice the amount, or the payment in would be a nullity, if the plaintiff's argument is right. Had the plaintiff taken out his money, he would not have been able to proceed, because, once he has his damages, there is no other cause of action. The rule must therefore be restricted to cases where the cause of action gives rise to separate claims for damages, as, for example, in a claim under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934, where different people are involved.

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[2] [1954] 2 Q.B. 42; [1953] 2 All E.R. 389.

[3] [1957] 1 W.L.R. 104; [1957] 1 All E.R. 23.

[4] [1949] A.C. 155; 65 T.L.R. 8; [1949] 1 All E.R. 60.

[5] [1940] A.C. 152; 55 T.L.R. 1004; [1939] 3 All E.R. 722.

[6] [1950] W.N. 570; 66 T.L.R. (Pt. 2) 836; [1950] 2 All E.R. 969.

The question here is whether the plaintiff could have brought two separate actions for the same injury. Further, could one ask the defendants to apportion the damages when even the judge will not do so in the end? The rule must mean separate causes of action which give rise to separate claims for damages. So far as Ord. 22, r. 1 (2), is concerned, the court should put a meaning on the phrase "causes of action" such as Lord Wright put on it in *Lochgelly Iron and Coal Co.* v. *M'Mullan.*[7]

The duty of an employer can be expressed in two ways, but in either case the cause of the action itself is the same. The court should not put an interpretation on a rule of court the only effect of which would be to increase costs. In this sense cause of action must mean those causes of action where separate awards of damages follow. Unless that is so, there can be no advantage to a plaintiff to know what sum is paid in in respect of what cause of action.

Nolan v. *C. & C. Marshall Ltd.*[8] is authority for the proposition that the sum awarded to the plaintiff should be regarded as part of his assets and that any costs the plaintiff is ordered to pay should come out of the damages awarded to him.

Cur. adv. vult.

January 17. DONOVAN J. read the following judgment: Consequent on my award of £760 damages as compared with a payment into court by the defendants of £1,000 the defendants ask that they shall have the costs of the action as from the date of such payment in.

The application is resisted on behalf of the plaintiff on the ground that the payment in must be regarded as a nullity, since it did not comply with the terms of R.S.C., Ord. 22.

[His Lordship read sub-rules (1) and (2) of Ord. 22, r. 1, and continued:] The plaintiff's claim in the present case was for damages for injury suffered by him through a breach of statutory duty on the part of the defendants, or through their negligence at common law. The notice of payment in is dated December 28,

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[7] [1934] A.C. 1, 25; 49 T.L.R. 566.

[8] [1954] 2 Q.B. 42.

1956, and reads as follows: "Take notice that the defendants, "Heinke & Co. Ltd., have paid into court £1,000 and say that "that sum is enough to satisfy the plaintiff's claim."

The plaintiff did not take out this sum and the action proceeded to trial with the result already stated. It is now said for the plaintiff that the notice should have specified the cause of action in respect of which the payment was made, that is, either breach of statutory duty or negligence at common law, or partly the one and partly the other, and that in the absence of such specification the payment in must be disregarded, so as to entitle the plaintiff to his full costs.

One view of this matter is that there are not two causes of action at all but only one, namely, damages suffered through the defendants' negligence, that negligence being the failure to take reasonable steps for the safety of the plaintiff while working for the defendants; and that this cause of action remains one such cause and not two, whether the negligence be the non-observance of the statute passed to protect a workman or the non-observance of the common law obligation to the like effect.

Reference may be made in this connexion to Lord Macmillan's speech in *Lochgelly Iron and Coal Co.* v. *M'Mullan.*[1]

On the other hand, one knows that in practice a defendant may be acquitted altogether of negligence at common law and yet commit a breach of statutory duty sounding in damages towards a workman. This supports the view that for practical purposes there are two causes of action and not one.

I need not go into the matter at length because Lord Wright said in *London Passenger Transport Board* v. *Upson*[2] that the two causes of action were different; and distinctions between claims for breach of statutory duty and for negligence at common law were also pointed out by the Court of Appeal in *Murfin* v. *United Steel Companies Ltd.*[3]

On the footing, therefore, that there are two causes of action in the present case the problem still remains: are there two such causes of action as Ord. 22, r. 1 (2), contemplates? And this is purely a question of construction. The purpose of the rule is tolerably clear. For example, in a claim for damages for slander, false imprisonment and malicious prosecution there is a separate claim for damages under each head, and a lump sum paid in generally, not specifying to which claim it related, would obviously embarrass the plaintiff in deciding whether to go on with the whole of his action or not, or which part of it to drop.

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[1] [1934] A.C. 1, 18; 49 T.L.R. 566.

[2] [1949] A.C. 155, 169; 65 T.L.R. 9; [1949] 1 All E.R. 60.

[3] [1957] 1 W.L.R. 104; [1957] 1 All E.R. 23.

No such situation arises in the present case. There is one and only one head of damage, namely, personal injuries suffered through the defendants' neglect either of their statutory or common law duty, so that the payment in left the plaintiff in no doubt at all what it was for, and this he frankly admits.

It is said that perhaps in some other case a plaintiff would be embarrassed if different defences were raised against the claim for breach of statutory duty and the claim for negligence at common law, unless the payment in were appropriated to one or other claim or apportioned between the two. Since the question is one of construction the argument is legitimate, but I must say that I have a difficulty in envisaging such a case. The present is certainly not one, for the payment in was made before any defence was delivered.

Looking at the matter from the point of view of a defendant, if he pays a sum into court and specifies that it is in satisfaction of the plaintiff's claim in respect of a breach of statutory duty, nothing is really gained by anybody, because if the sum is taken out, then automatically the claim for damages for common law negligence will go. No additional damages are payable under that head. The converse is true if the notice of payment in specifies the claim for common law negligence as the claim or the cause of action which is being satisfied; and if the notice appropriates part of the payment to each of the two claims the process is quite unreal, and the defendant would be doing something which never has to be done at the trial.

Alternatively, if the sum is left in court and the action proceeds, only one of the two causes of action fructifies in damages, and there is no difference in the amount whichever one it is.

The plaintiff in the present case says that any difficulties can be resolved by an application under the rule itself for exemption from specifying the causes of action; but this does not solve the problem here posed, which is one of construction, namely: is there any duty at all from which exemption could be sought?

In my opinion there is not. I think the rule contemplates cases where there are several causes of action giving rise to several independent claims for damages; not a case where although there may be two causes of action, they are really alternative in that only one award of damages is possible; so that satisfaction of one cause of action ends the whole claim. Such is the present case, and no purpose at all would be served by making the defendant in such a case specify that his payment in was in respect of a breach of statutory duty or in respect of common law negligence.

Accordingly, to deprive such a defendant of his costs for failure to make such a specification would be wholly unjust, and I ought to avoid such a result if some other construction of Ord. 22, r. 1 (2), is reasonably possible. I think it clearly is, being the one I have stated. I therefore reject the plaintiff's argument on this point.

I am next urged to exercise my discretion in favour of the plaintiff in the matter of costs, either by giving him the whole of his costs or making an order for no costs after the date of payment in. It should be remembered that the writ in this case was issued on December 5, 1956, and the statement of claim was delivered on the same day. The payment in of £1,000 was made on the 28th of the same month, before any defence was delivered.

The plaintiff considered it was not enough. Rightly or wrongly I have held that it was more than enough. So the whole costs of the action since December 28, 1956, have been occasioned by the plaintiff's view, now held to be wrong. In these circumstances I can see no ground for making the defendants pay the expense of the proceedings after payment in, or to deprive them of their own costs of resisting such proceedings.

Next I am asked not to order that any balance of costs found to be due to the defendants should come out of the damages now awarded to the plaintiff, since he is legally assisted. *Nolan* v. *C. & C. Marshall Ltd.*,[4] where such an order was made and upheld, was cited to me, though no doubt in a proper case a judge still has a discretion to do otherwise. But I can see no reason to do otherwise in this case.

Where a litigant is assisted by public funds, a particular duty lies on him not to refuse a reasonable offer, and certainly not to trade on his privileged position in the matter of costs to decline to accept a payment in which he might well accept if not so privileged. I am not saying that this is such a case, but if I were to treat the award of damages in the present case as inviolate, as I am asked to do, I think I should be setting an unfortunate precedent because there are no special facts about the present case to justify such special treatment.

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[4] [1954] 2 Q.B. 42; [1953] 2 All E.R. 389.

Having said that, I hope I may still say that I am very sorry for this particular plaintiff. Through not accepting the £1,000, he gets £760 less costs, which will substantially diminish the award; but I can see no ground on which I can give him relief. If the defendants feel it right not to enforce the order regarding costs, or to make some concession regarding that, that, of course, is a matter entirely for them.

My order must be that the plaintiff have the costs of the action up to the date of payment in, and the defendants have the costs thereafter, and that any excess of the latter costs over the former be paid to the defendants out of the £1,000 in court; the balance to be paid out to the plaintiff. I make the usual order for taxation of the plaintiff's costs under the legal aid scheme.

Order accordingly.

Solicitors: *King-Hamilton & Green; Kingsbury & Turner.*

C. J. E.

PIPER *v.* HARVEY.

[Plaint No. N. 1472.]

C. A.
1958
Feb. 6.

Lord Denning, Hodson and Pearce L.JJ.

Landlord and Tenant — Rent restriction — Possession application — Greater hardship—Whether proviso as to greater hardship repealed by Act of 1957*—Evidence of greater hardship—Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *Sch. I, para.* (*h*), *proviso—Rent Act,* 1957 (5 *&* 6 *Eliz.* 2, *c.* 25), *Sch.* 6, *para.* 21.

In 1951 a landlord purchased a bungalow subject to the Rent Restriction Acts, hoping to obtain possession of it as a residence for himself and his invalid wife. Being a landlord by recent purchase, he was unable to apply for possession until after the coming into force of the Rent Act, 1957, which by amending provisions enabled a landlord who had purchased a dwelling-house before November 7, 1956, to apply to the court for possession.

In the county court it was submitted for the landlord that the repeal and replacement of paragraph (*h*) of the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933,[1] by paragraph 21 of the Sixth Schedule to the Rent Act, 1957,[2] had effected the repeal of the proviso regarding greater hardship.

By the evidence the landlord showed that he and his wife lived in one room in difficult conditions which gravely affected her health. The tenant, on whom lay the burden of proving greater hardship, did not show that he had made any strenuous efforts to obtain other accommodation:—

Held, (1) that the substituted provisions in paragraph 21 of the Sixth Schedule to the Act of 1957 did no more than alter the qualifying date for a landlord by purchase, since the proviso, although operating only on paragraph (*h*), was expressed to be a proviso to all the provisions of the First Schedule to the Act of 1933; accordingly the condition as to satisfying the court on "greater hardship" had not been repealed.

(2) That on the facts the only reasonable conclusion to which the court could come was that the tenant had not discharged the burden of proving greater hardship, and accordingly the order for possession should be made in favour of the landlord.

Chandler v. *Strevett* (1947) 63 T.L.R. 84; [1947] 1 All E.R. 164 applied.

APPEAL from Judge J. B. Herbert, sitting at Southend County Court.

In 1951 the plaintiff landlord, Charles Piper, bought a bungalow at Rayleigh, Essex, consisting of three living-rooms, a kitchen and a bathroom. The bungalow was within the provisions of the Rent Restriction Acts, and the defendant, one Harvey, had been the tenant of it for some years, paying a weekly rent of 10s. The landlord was unable to obtain possession of the premises as the law then stood, though he had bought it in the hope of obtaining possession of it as a residence for himself and his wife.

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[1] Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sch. I [as amended by the Rent and Mortgage Interest Restrictions Act, 1939, Sch. I]: "A court shall . . . "have power to make or give an "order or judgment for the recovery "of possession of any dwelling-house "to which the principal Acts apply "or for the ejectment of a tenant "therefrom without proof of suitable "alternative accommodation (where "the court considers it reasonable so "to do) if—. . . (*h*) the dwelling-house "is reasonably required by the land-"lord (not being a landlord who has "become landlord by purchasing the "dwelling-house or any interest "therein after September 1, 1939), "for occupation as a residence for "—(i) himself; or (ii) any son or "daughter of his over eighteen years "of age; or (iii) his father or mother: "Provided that an order or judgment "shall not be made or given on any "ground specified in para. (*h*) of the "foregoing provisions of this Schedule "if the court is satisfied that having "regard to all the circumstances of "the case, including the question "whether other accommodation is "available for the landlord or the "tenant, greater hardship would be "caused by granting the order or "judgment than by refusing to grant "it."

[2] Rent Act, 1957, Sch. 6, para. 21: "For paragraph (*h*) of the First "Schedule to the Act of 1933 (which "relates to possession without proof "of alternative accommodation), the "following paragraph shall be sub-"stituted—"(*h*) the dwelling-house "is reasonably required by the land-"lord (not being a landlord who has "become landlord by purchasing the "dwelling-house or any interest there-"in after November 7, 1956) for "occupation as a residence for—(i) "himself; or (ii) any son or daughter "of his over eighteen years of age; "or (iii) his father or mother."

After the coming into force of the Rent Act, 1957, he brought proceedings in the county court, claiming that he was entitled to possession of the bungalow and that the tenant's tenancy had been duly determined by a notice to quit. He stated that the rateable value of the premises at that date was £18 and that he "reasonably requires the premises for occupation as a residence "for himself and his wife." The tenant by his defence claimed that "greater hardship" would be caused by making an order for possession than by refusing such order.

Before the county court judge the landlord gave evidence that he had bought the bungalow to live in it and for the benefit of his wife; that he had been bombed out during the war and in 1947 had gone to live at his brother's house, where he and his wife occupied one front room upstairs, sharing the kitchen with his brother's family; that his wife was suffering from mental illness and asthma; that she could not climb stairs; that they did not have access to the garden; and that his average earnings were £11 10s. a week. A doctor called on his behalf stated that the wife's mental condition caused her to stamp on the floor and hammer on the walls of the room they occupied, and that she would be better out of her present living conditions; that one of the treatments for her mental condition was occupational therapy, and that as she was keen on gardening, a garden would assist her health. The tenant, under examination-in-chief, said that he had been tenant of the bungalow for 17 years, occupying it with his wife, his son aged 20, and his daughter aged 18, who slept next door at the home of his mother-in-law. He said that he had tried with the local council to find other accommodation and had been on their list for a number of years. His son worked on road-making and his daughter was training for a profession and getting £1 a week. He himself earned £11 a week, and the son contributed £2 a week to the household. In cross-examination the tenant said that he had applied to the council for accommodation years ago, and that the council had told them that "we could afford to buy."

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The county court judge accepted the landlord's evidence and held that he was perfectly reasonable in asking for possession. But—holding, as he did, that the proviso to paragraph (*h*) in the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 [1] (requiring proof of "greater hardship"), had not been repealed by the substituted paragraph 21 of the Sixth Schedule to the Rent Act, 1957 [2]—the judge stated that despite having great sympathy with the landlord, he had to bear in mind the tenant's family of four, not to speak of the mother-in-law next door; and he continued: "For them to obtain other "accommodation is, and was, on the evidence, apparently almost "impossible unless by some miracle the local authority come to "their assistance." The problem narrowed itself largely to the question whether the need of the landlord's wife was so urgent that from the point of view of health it must override the hardship on the tenant if his family had to get out. On balance the judge held that the landlord's problem was not immediately urgent and that the scale came down in favour of the tenant, who had satisfied him that more unhappiness and hardship would be caused if he made the order for possession than if he refused. He accordingly refused to make the order asked for. The landlord appealed.

A. E. Holdsworth for the landlord. First, there was here no evidence on which the judge could find greater hardship on the tenant. Though the question is one of fact for him, this court can interfere with his decision if a reasonable person could have come to only one conclusion: see *per* Lord Greene M.R. in *Coplans* v. *King*.[3] In *Smith* v. *Penny* Somervell L.J.[4] said that the appellant must show that the judge based his decision on some finding of fact as to which there was no evidence; this landlord can show that. [*Briddon* v. *George* [5]; *Chandler* v. *Strevett* [6]; *Rhodes* v. *Cornford* [7]; *Kelley* v. *Goodwin*,[8] and *Harte* v. *Frampton* [9] were also referred to.]

Secondly, the substitution of paragraph 21 of Schedule 6 to the Rent Act of 1957 for paragraph (*h*) ("the relevant paragraph") of Schedule 1 to the Act of 1933 has had the effect of repealing the proviso to paragraph (*h*) as to proof of "greater hardship."

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[1] For footnote 1 see p. 440.

[2] For footnote 2 see p. 440.

[3] [1947] 2 All E.R. 393, 394.

[4] [1947] K.B. 230, 233; 62 T.L.R. 750; [1946] 2 All E.R. 672.

[5] [1946] 1 All E.R. 609.

[6] (1947) 63 T.L.R. 84; [1947] 1 All E.R. 164.

[7] [1947] 2 All E.R. 601.

[8] [1947] 1 All E.R. 810.

[9] [1948] 1 K.B. 73; 63 T.L.R. 554; [1947] 2 All E.R. 604.

County court judges have given conflicting decisions on this controversial point since the Act of 1957 came into force, and the court's view on it would be of assistance.

A consideration of the history of rent restriction legislation, beginning in 1915, supports this submission. The subject-matter and emphasis of rent restriction legislation has changed over the years. At first it was directed to restricting rents; later the emphasis was on prevention of eviction when there was a housing shortage; then came reimposition of control with the outbreak of war in 1939; and since then the tendency has been towards progressive decontrol which has favoured the landlord. Throughout the legislation the court's jurisdiction to make possession orders has always been restricted to special grounds, and in the Act of 1919 these were first set out in a series of paragraphs. The provision as to greater hardship, which has always been concerned with the landlord's requirement for his own occupation, has changed from time to time, and its position and content have also changed. It was first introduced in the Act of 1920, in section 5 (1) (*d*), where it was in the middle of a series of paragraphs, each of which ended with a semi-colon. There was an exception to paragraph (*d*), with regard to alternative accommodation, which, though it came at the end of the series of paragraphs, should be read as limited in its application to paragraph (*d*). In the Act of 1933 (Rent and Mortgage Interest Restrictions (Amendment) Act), the test of overall reasonableness was put at the beginning of section 3, "alternative accommodation" was made a ground for possession in any case, and all the other grounds for obtaining possession, including "the relevant paragraph," were set out in a series of paragraphs in the First Schedule, and the "relevant "paragraph," previously paragraph (*d*) (supra), which had been in the middle of the series, became paragraph (*h*) and was put at the end. But as the landlord no longer had to show "alter-"native accommodation," the earlier exception clause limited to paragraph (*d*) was dropped, and a proviso to paragraph (*h*) was introduced, which, it is submitted, applied only to paragraph (*h*). The draftsman may have overlooked the moving down of paragraph (*d*) to (*h*), for that moving down rendered superfluous the specific reference to paragraph (*h*) in the proviso.

[PEARCE L.J. But in fact the proviso was made a proviso to the whole Schedule, both in the printing and in the wording.]

If the court had been invited to construe paragraph (*h*) and the proviso in the Act of 1933 at the time when that Act was passed, the court would have said that the proviso applied only to paragraph (*h*). If that submission is correct, it follows that by the repeal of paragraph (*h*) and the substitution of paragraph 21 in the Act of 1957, which ends with a full stop and does not include the words of the proviso, the legislature has intended to repeal the requirement as to greater hardship.

Though it may be contended against this submission that the sole object of Parliament in substituting the new paragraph 21 for the former paragraph (*h*) was to change the disqualification date for the landlord by purchase, that could have been done quite simply by changing the date itself and nothing more, as was done in the Acts of 1938 and 1939. The fact that Parliament chose this circuitous route is support for the submission that more was intended than the change of date. Support is also obtained from the punctuation. In the Acts before 1933 there was a semi-colon at the end of each of the series of paragraphs; in the Act of 1933 there was a colon at the end of paragraph (*h*); and in the Act of 1957 there is a full stop. Though punctuation, like lay-out, has been said to be no part of an Act of Parliament, this punctuation has some significance. The Act of 1957 was intended to modify the controls on landlords, and the repeal effected in the manner submitted is part of that intention.

Mark B. Smith for the tenant. [The court indicated that they did not wish to hear counsel on the submission that the proviso had been repealed.]

On the merits, all that the tenant can do is to show matters of hardship, though it is important that the court, in weighing the evidence on both sides, shall have regard to the fact that if possession is given to the landlord the tenant will have nowhere to go. If there is anything in each balance of the scale which the county court judge can weigh up, that is enough; it is then for the judge to decide on what side the scale comes down, and this court should not then interfere. That is the ratio of *Coplans* v. *King*, *per* Lord Greene M.R.[10] There was here evidence of hardship on both sides, and the judge decided in favour of the tenant.

LORD DENNING stated the facts and continued: It was suggested by Mr. Holdsworth that as a result of the amending Act of 1957 it was quite enough if the landlord proved that he wanted the premises for occupation as a residence for himself, and that no question of greater hardship came into the matter. Mr. Holdsworth based his argument on the wording of the amendment in paragraph 21 of the Sixth Schedule to the Rent Act, 1957. He said that the effect of that paragraph was to replace paragraph (*h*) in the First Schedule to the Act of 1933 and to omit the proviso about greater hardship. He has referred us to the past history of this legislation, to the way in which amendments have been made, and to the punctuation, and has urged us to say that since 1957 the proviso about greater hardship has gone. He said that it was a difficult point and there have been decisions of county court judges each way on the matter.

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[10] [1947] 2 All E.R. 393, 394.

Having heard the whole of the careful and able argument presented to us, I am quite satisfied that the provision about greater hardship still applies. Paragraph 21 simply inserts, instead of the old paragraph (*h*), the new words there set out. It does nothing more than alter the date about the landlord's purchase of the property. The proviso about greater hardship is not a proviso included in paragraph (*h*). It is a proviso to the whole Schedule. That is clear from the words "on any ground "specified in paragraph (*h*) of the foregoing provisions of this "Schedule." Being a proviso to the whole Schedule, it is still intact.

Having failed on this point of law, Mr. Holdsworth asks us to review the judge's findings on the facts. It is plain that the landlord now requires the bungalow for himself. The question is where the greater hardship lies. [His Lordship reviewed the evidence, and continued:] The question [on the tenant's evidence] immediately arises, what steps had he (the tenant) taken to try to get some other accommodation? According to the judge's note, all he said about that was: "I have tried with the "council. I have been on their list for a number of years." When he was cross-examined, he said: "I applied to the council "years ago. They told us we could afford to buy."

What does that show? He did not give evidence that he had been round hunting for houses. He did not show that he had made any effort to buy another house, or get another house at all, apart from his action in going to the council years ago. The burden is on the tenant to show that there is greater hardship on him by having to move. The judge thought that he had shown it. He said: "For them to obtain other accommodation is, and was, on the evidence, apparently almost impossible unless "by some miracle the local authority come to their assistance. "It may be possible for them to obtain other accommodation "here, but they say they cannot."

The question for this court, which is not an easy one, is whether that is a reasonable and possible conclusion for the county court judge to come to having regard to all the evidence. It is undoubtedly the law that if it is just a matter of weighing the balance of hardship, that is a matter for the judge himself who hears the case, and is not a matter in which this court can interfere. This court can only interfere if on all the evidence there is only one reasonable conclusion to be come to, or, alternatively, if the judge has misdirected himself on the facts or on the evidence. Here it is a very close thing. But when I look at all the evidence and see the strong case of hardship which the landlord put forward, and when I see that the tenant did not give any evidence of any attempts made by him to find other accommodation, either to look for another house to buy or to rent, it seems to me that there is only one reasonable conclusion to be arrived at, and that is that the tenant did not prove (and the burden is on him to prove) the case of greater hardship. Although it is very rarely that this court interferes in a hardship case, this does seem to me to be a case where there is only one conclusion possible. I would therefore allow the appeal and give judgment for the landlord for possession.

HODSON L.J. I agree. On the question of construction I have no doubt that paragraph 21 of the Sixth Schedule to the Act of 1957 has the effect of substituting for paragraph (*h*) of the First Schedule to the earlier Act a new paragraph which is set out in extenso in the section (although it merely alters the date) and does not have the effect of repealing the proviso which was contained in the Act of 1933. The reason for that is clear from the language of the proviso itself, which begins with the words: "Provided that an order or judgment shall not be made "or given on any ground specified in paragraph (*h*) of the fore-"going provisions." Paragraph (*h*) is the only one on which the proviso has any operation; but the proviso itself is expressed to be a proviso to the whole "of the foregoing provisions," which indeed are numbered (*a*) to (*h*), so that the repeal of (*h*) does not have the effect of repealing the proviso. Mr. Holdsworth has gone through the history of this legislation and shown us how the situation of this provision or a similar provision has altered from time to time. Notwithstanding his argument, and particularly his pointing out to us that the date could easily have been altered without substituting an entirely new proviso, I am of opinion that the words are so clear that it is impossible to say that the proviso has gone.

On the main question for consideration on this appeal, namely, whether the judge was wrong in coming to the conclusion that he did on greater hardship, I have in mind what this court has said in *Coplans* v. *King*[1] to the effect that the decision of the county court judge, when considering the balance of hardship, is to all intents and purposes final. It is not for the Court of Appeal to interfere when there is evidence on which the judge can reasonably come to the conclusion which he did.

Certain observations of Scott L.J. in *Chandler* v. *Strevett*[2] were criticized in *Coplans* v. *King*.[3] The two other members of the court in *Chandler* v. *Strevett*[4] were Bucknill L.J. and Somervell L.J., and the court had to deal with a similar problem. At the outset of his judgment Bucknill L.J. said what, I think, Lord Denning has just pointed out, and what I feel myself[5]: "This appeal raises the difficult question whether "there was any evidence on which the judge could come to the "conclusion from which the appeal has been made." Somervell L.J.[6] came to the conclusion which I have reached in this case, namely, that there is really only one possible answer on the issue of greater hardship, and that is in this case in favour of the landlord. The tenant has not been able to say anything more than the minimum which every tenant can say, namely, that he has in fact been in occupation of the bungalow, and that he has not at the moment any other place to go to. But he has not sought to prove anything additional to that by way of hardship in the way of unsuccessful attempts to find other accommodation, or indeed to raise the question of his relative financial incompetence as compared with the landlord. On the face of it the tenant's financial position, or that of his family, is very much superior to that of the landlord. The domestic position of the landlord is indeed a hard one. It is not even a case where he is occupying a house on his own; he is living with his invalid wife in an unfurnished room upstairs in a house which does not

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[1] [1947] 2 All E.R. 393.

[2] (1947) 63 T.L.R. 84; [1947] 1 All E.R. 164.

[3] [1947] 2 All E.R. 393, 394.

[4] [1947] 1 All E.R. 164.

[5] Ibid. 166.

[6] Ibid. 168.

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belong to him, and there is very strong evidence of hardship on his side; whereas I am bound to say that I can see no evidence on the other side which can be put into the scale to balance that. I would therefore allow the appeal.

PEARCE L.J. I agree.

Appeal allowed with costs.
Judgment below set aside and entered for plaintiff.
No order as to costs in court below.

Solicitors: *Daybell, Court-Cooper & Co., Ilford; Gibson & Weldon for H. Maxwell Lewis, Southend-on-Sea.*

M. M. H.

1957
Nov. 10, 11;
Dec. 6.

Barry J.

SHAMIA *v.* JOORY.

[1953 S. No. 4439.]

Contract — Parties — Enforcement by third party — Money had and received—Debtor and creditor—Debtor's promise to pay money to third party as gift from creditor—Failure to pay—Whether action for money had and received will lie at suit of third party—Whether "fund" in hands of or accruing to debtor.

The defendant, an Iraqi merchant, carrying on business in this country, agreed at the request of Y., his agent in Iraq, to pay £500 to the plaintiff (Y.'s brother), in this country out of money owed by the defendant to Y. as remuneration for services rendered. Y. informed the plaintiff of the arrangement and in due course the defendant sent the plaintiff a cheque for £500. Owing to an irregularity the cheque was not met and the plaintiff returned it to the defendant at his request for correction. Notwithstanding the defendant's promise to send the corrected cheque back to the plaintiff, it was never sent and the £500 was never in fact paid to the plaintiff.

In an action by the plaintiff against the defendant, inter alia, for money had and received by the defendant to the plaintiff's use the defendant admitted his promise to Y. to pay the plaintiff the sum claimed, but contended that in view of certain unauthorized property dealings subsequently carried out by Y. for which Y. had received the money, the defendant was no longer indebted to Y. at the date of the writ and was not indebted to the plaintiff:—

Held, (1) that although the plaintiff was not a creditor of Y., but the recipient of a gift from him, he had a legal right to recover the £500 and could recover it from the defendant provided that there was a "fund" in the defendant's hands at the time he accepted Y.'s instructions and made his promise to the plaintiff.

Principle laid down by Blackburn J. in *Griffin* v. *Weatherby* (1868) L.R. 3 Q.B. 753, 758 applied.

(2) That to establish the existence of a "fund" it was not necessary to show that an identifiable sum of money had been handed to the defendant, and, for a suit for money had and received to lie at the hands of the transferee against the third party, all that the law required was that there must be in the hands of the third party, or accruing to him, either a sum of money, or a monetary liability, over which the transferor had a right of disposal; it was immaterial whence the liability arose, and it could include a debt for money lent or for services rendered, and of a temporary nature, provided that it existed at the date of the transfer and of the debtor's promise to pay the transferee; accordingly, the plaintiff was entitled to recover the £500 from the defendant and his right to do so could not be defeated by any subsequent dealings between the defendant and Y.

Griffin v. *Weatherby* (1868) L.R. 3 Q.B. 753, *Walker* v. *Rostron* (1842) 9 M. & W. 411 and *Hamilton* v. *Spottiswoode* (1849) 4 Ex. 200 considered.

ACTION.

The following statement of facts is summarized from the judgment. The plaintiff, Reuben Ibrahim Shamia, was a citizen of Iraq who, in 1952, was in England studying as a dental student. He had two elder brothers, Haroun and Yousuf, living in Iraq. The defendant, Shaoul Saleh Joory, also a citizen of Iraq, had left Baghdad in 1949 and had since carried on business in Manchester as a textile merchant and importer. In 1951 the defendant appointed the plaintiff's brother, Yousuf, as his representative and agent in Iraq, Yousuf's chief duties being concerned with the collection of rents and the letting of property belonging to the defendant. Yousuf sent the defendant periodical accounts, the last written one being dated May 1, 1952. In June or July, 1952, the defendant paid a visit to Iraq and while there he entered into contracts to sell certain properties. Before leaving for England in November, 1952, he gave Yousuf a power of attorney enabling him to complete sales of property which the defendant had negotiated during the time he was in Baghdad, and he also discussed with Yousuf the remuneration due to him and agreed the state of the account between them. No written account was submitted by Yousuf, but the defendant accepted that he owed Yousuf 1,300 dinars. (At that time the dinar was equivalent to £1 sterling.) At Yousuf's request the defendant agreed to give

£500 out of the money he owed Yousuf to the plaintiff. According to the defendant, Yousuf gave no explanation of the request and no mention was made of the brother Haroun.

In the latter part of November, 1952, Yousuf wrote three letters to the plaintiff stating that Haroun had sent him a gift by the defendant. All three letters were written in guarded language owing to certain restrictions regarding the export of currency from Iraq but they referred (as the judge found) to the £500. On December 8, 1952, the plaintiff wrote to the defendant informing him that he had heard from Iraq that his brother Haroun had sent him £500 through the defendant and asking the defendant, if that information was correct, to send the money to him. The defendant replied stating that the information was correct and undertaking to send the money at the end of December. At the beginning of January, 1953, the plaintiff received another letter from the defendant enclosing a cheque for £500. There was some difference of opinion between the parties as to the exact translation of the letter, which was in Arabic and which, though incorrectly dated, Barry J. found to have been sent on December 31, 1952. His Lordship also found that there was no material difference between the sense of the two translations, the effect of the letter being the same whether the more correct translation was "Enclosed you will find a "cheque which belongs to you" (as the plaintiff contended) or "Enclosed you will find a cheque for £500 due to you" (as the defendant contended).

The plaintiff deposited the cheque with his bank for collection and at the same time cabled Yousuf in Iraq to inform him that the money, said to have been sent by Haroun, had been safely received. Subsequently, owing to a technical irregularity in the drawing of the cheque, it was not met and the plaintiff's account was debited accordingly. The plaintiff's account of the succeeding events, which was accepted by his Lordship, was that after a telephone conversation with the defendant, and at the defendant's request, he sent the cheque back, the defendant undertaking to correct it and return it to the plaintiff or send the plaintiff a fresh cheque. In spite of a number of subsequent telephone conversations, some with the defendant's son and some with the defendant himself, in one of which he promised to send a cheque, no cheque arrived. The plaintiff eventually drew a sight bill on the defendant but it was not accepted and the £500 remained unpaid.

Meanwhile a serious rift had developed between the defendant and Yousuf over the sale of certain property in Iraq. On January 16, 1953, the defendant cancelled Yousuf's power of attorney and transferred the control of his business in Iraq elsewhere. On January 28 he received a statement of the account between himself and Yousuf which showed the net debt from the defendant as at November, 1952, as 1,383 dinars; then there appeared a number of credit items and the defendant was then debited with a further sum of 1,400 dinars as Yousuf's charges for services rendered, and ultimately the statement showed a small credit of 47 dinars in the defendant's favour. The defendant accepted that account and a settlement between him and Yousuf was eventually reached which was embodied in a formal document dated February 2, 1953.

In this action the plaintiff claimed the sum of £500 as money had and received by the defendant in trust for him and on his behalf and to his use. Alternatively, the like sum under an agreement made between him and the defendant; alternatively, the like sum as damages for breach of contract. He contended that at a date which he could not specify the defendant had received and accepted £500 from Yousuf in Baghdad for the purpose of paying that sum to him (the plaintiff) and that the defendant had since held and still held it in trust for him and on his behalf and to his use. Further, or in the alternative, he claimed that by an agreement made in November, 1952, between Yousuf and the defendant it was agreed that the defendant should pay him, the plaintiff, £500 out of the debt of approximately £1,300 then due and owing by the defendant to Yousuf; that by that agreement the sum of £500 in the hands of the defendant was specifically appropriated for payment to the plaintiff, or alternatively was, with the agreement of the defendant, assigned or charged by Yousuf to or in favour of the plaintiff; that by a letter of December 12, 1952, to the plaintiff the defendant acknowledged to him that he had so received and was so holding the £500.

Further or in the alternative, on December 12, 1952, the defendant agreed with the plaintiff to pay him £500 at the end of that month; that after the irregularly drawn cheque had been sent it was agreed between them that in consideration of the plaintiff returning the cheque to the defendant the defendant would correct it as necessary and return it to the plaintiff duly altered. Pursuant to that agreement, the plaintiff returned the cheque to the defendant upon his promise to send it back duly altered or to send another cheque for £500 properly drawn, but notwithstanding repeated requests so to do the defendant, in breach of the agreement, had failed and neglected to return the cheque to the plaintiff duly altered or to send another cheque properly drawn in its place.

The defendant had wrongfully and in breach of his trust and notwithstanding repeated requests made by the plaintiff failed and refused to pay the £500 or any part thereof to the plaintiff to whom it was still due and owing.

The defendant denied that he was indebted to the plaintiff in the sum of £500 or that he had received that or any sum from Yousuf for the purpose of paying it to the plaintiff. He admitted that he had agreed to Yousuf's request in November, 1952, to pay the plaintiff £500 out of £1,300 which was at that time owed by the defendant to Yousuf, and further admitted that he told the plaintiff that he would send him the money; that he sent an incorrectly drawn cheque; and that the cheque was returned to him for correction. He claimed that following his discovery that Yousuf had sold certain of his property in Iraq without his instructions, thereafter he delayed payment of the money to the plaintiff pending clarification of the financial position as between himself and Yousuf; that the statement of account of January 28, 1953, had not taken into account the £500 which was to have been paid to the plaintiff; further, that by reason of the aforesaid sale of property by Yousuf against his, the defendant's, instructions, for which Yousuf had received the purchase price of £2,300, he, the defendant, was no longer indebted to Yousuf in the sum of £1,300 of which the £500 was a part. In the premises at the date of the issue of the writ no part of the £500 was due and owing from the defendant to the plaintiff.

Mark Littman for the plaintiff. The issue of fact is irrelevant, because if the money which the defendant was bringing from Yousuf to the plaintiff was in fact a gift from Haroun, then the relations between the defendant and Yousuf were immaterial. Even if it was a present from Yousuf, as the defendant contends, any rights existing between Yousuf and the defendant would not affect the plaintiff's right to recover the money in this action, because the defendant bound himself to pay it to the plaintiff. The plaintiff is entitled to recover on three grounds:

(a) A contract was created between the plaintiff and the defendant when the plaintiff returned the incorrectly drawn cheque at the defendant's request and in return for his promise to send a good cheque for £500. The return of the incorrectly drawn cheque, although prima facie of no value, was good consideration for the defendant's promise to send the good cheque: see Anson's Law of Contract, 20th ed., p. 89, chap. 3, s. 4, para. 2, as to the law on the adequacy of consideration. By failing to send a good cheque in accordance with his promise the defendant was in breach of his agreement.

(b) Assuming that the £500 was a gift from Yousuf to the plaintiff, the defendant admits that he promised to pay it to the plaintiff on Yousuf's behalf out of the £1,300 he owed Yousuf. He is bound by that promise on the principle summarized in Bowstead's Digest of the Law of Agency, 11th ed. (1951), p. 269, art. 128, and the plaintiff is entitled to recover at common law in an action for money had and received or in trust for him. Reliance is placed on *Griffin* v. *Weatherby*,[1] which is on all fours with the present case. In that case the defendant was directed by his creditor to pay money to the plaintiff, and the defendant agreed to do so as soon as sufficient funds for the purpose came into his hands. Funds did come into his hands, but before he paid the plaintiff the defendant ceased to be indebted to his creditor. Nevertheless it was held that the plaintiff was entitled to recover the money from the defendant. A fortiori, the plaintiff here is entitled to recover because the defendant owed Yousuf a considerable sum of money and he made an unconditional promise to pay part of it to the plaintiff. It is irrelevant that the situation between himself and Yousuf subsequently changed.

(c) Alternatively, the plaintiff is entitled to recover upon the ground that there was an equitable assignment by Yousuf to the plaintiff of a part of the sum owed by the defendant to Yousuf.

Peter Boydell for the defendant. As to the alleged breach of contract, there was no fresh contractual relationship created between the parties when the plaintiff returned the faulty cheque in return for the defendant's promise to send a good cheque, because the faulty cheque was not good consideration for the promise to send the good one. To constitute consideration for a promise an act or forbearance must be of some value in the eye of the law: Halsbury's Laws of England, 3rd ed., vol. 8, p. 116. The court will inquire whether the alleged consideration, in this case the piece of paper on which the cheque was incorrectly drawn, has some value, and only when it is satisfied that it has can a party rely on the doctrine that the inadequacy of the consideration is immaterial. Here there is no evidence that the faulty cheque had any value either to the plaintiff or to the defendant, so there could have been no detriment to the plaintiff or benefit to the defendant. It is fanciful to suggest that it had. All the cases show that when a document or an article which appears to be worthless has been regarded as good consideration a reason has emerged in the course of the case to show that one party or the other had very good reason for wanting to get hold of it: see *Haigh* v. *Brooks*[2]; *Bainbridge* v. *Firmstone*[3]; *Smith* v. *Smith*[4]; *Begbie* v. *Phosphate Sewage Co. Ltd.*[5] In any event there was no evidence here of any intention on the part of either party to enter into a fresh legal relationship. Up to the time of the return of the faulty cheque there was no such relationship.

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[1] (1868) L.R. 3 Q.B. 753.

As to the plaintiff's claim to recover on the basis of money had and received, it is admitted that Blackburn J. in *Griffin* v. *Weatherby*[6] correctly stated the law, but in the present case such a claim cannot lie, because there never was a fund in the defendant's hands. No claim on this ground has ever succeeded unless there was an actual fund. *Walker* v. *Rostron*[7] and *Hamilton* v. *Spottiswoode*[8] can be distinguished because in those cases there were funds either actually in the hands of the agent or which were expected to be in his hands. No debt owing by a third person can constitute a fund or become subject to the principle enunciated by Blackburn J. in *Griffin* v. *Weatherby*.[9] A fortiori, where the indebtedness is of a merely temporary nature, as it was in the case of the defendant's debt to Yousuf, it cannot possibly be regarded as a fund within the principle. To treat it as such would lead to inconvenience and possible injustice and it would undoubtedly lead to hardship on the defendant in the present case. [Reference was also made to *Morrell* v. *Wootten*,[10] *Lilly* v. *Hays*[11] and *Williams* v. *Everett*.[12]]

With regard to the suggestion that there was an equitable assignment, there was nothing that could be described as a debt owing from Yousuf to the plaintiff and therefore there was nothing capable of being assigned. This was merely a voluntary gift from Yousuf to the plaintiff. A mere order by a creditor to pay a sum of money to another person out of a fund not specified cannot amount to an assignment: Halsbury's Laws of England, 3rd ed., vol. 4, p. 492, para. 1092. The plaintiff is not entitled to succeed.

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[2] (1839) 10 Ad. & E. 309.
[3] (1838) 8 Ad. & E. 743.
[4] (1863) 13 C.B.N.S. 418.
[5] (1876) 1 Q.B.D. 679.
[6] (1868) L.R. 3 Q.B. 753, 758.
[7] (1842) 9 M. & W. 411.
[8] (1849) 4 Ex. 200.
[9] L.R. 3 Q.B. 753, 758.
[10] (1852) 16 Beav. 197.
[11] (1836) 5 Ad. & E. 548.
[12] (1811) 14 East 582.

Mark Littman in reply. As to the defendant's submission that the faulty cheque could not constitute good consideration for the promise to return a good cheque, the courts have increasingly taken the view that bargains should be kept, and provided that there is something capable of being regarded as consideration they will not inquire into the adequacy of it: Cheshire and Fifoot on the Law of Contract, 4th ed. (1956), p. 65. Here there was both detriment to the plaintiff and benefit to the defendant. In surrendering the faulty cheque the plaintiff was parting with a piece of paper of which he was the owner. There is no warranty for the presumption that it was property which had no value, and it is not fanciful to suggest that it had a value to the plaintiff apart from its obvious one as a piece of evidence. As to benefit to the defendant, he asked to have the faulty cheque back and he got what he wanted. The old cases show that if a party to a contract has obtained what he wanted, the courts will not go into the question whether what he desired was of great or little value. The law is correctly stated by Lord Denman C.J. in *Haigh* v. *Brooks* [13] and *Bainbridge* v. *Firmstone*.[14] Contrary to the defendant's submission, this was intended to be a legal bargain. It was not a purely personal or domestic transaction, but a financial one, and on the facts one is compelled to the view that the parties meant what they said and that a contract was created between them. [Reference was also made to *Smith* v. *Smith* [15] and *Begbie* v. *Phosphate Sewage Co. Ltd.*[16]]

As to the claim for money had and received, on the assumption that the facts are as they are admitted to be on his behalf, the plaintiff is entitled to judgment. The nub of the defendant's case is that he is not liable to pay the plaintiff, because after he agreed to do so it subsequently appeared that there was nothing left out of the £1,300 he originally owed to Yousuf from which to pay it. It was not argued that if there had been money left, the plaintiff could not have sued the defendant either on the basis of money had and received or on the basis of equitable assignment, so that the strength of the defendant's argument can be tested by asking what the position was at the date when the faulty cheque was given. At that date the defendant had the £1,300 and therefore there could have been no answer to the plaintiff's claim against the defendant if it had been brought then. Nothing that happened afterwards could affect the position. Unless there is force in the defendant's submission that there is

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[13] 10 Ad. & E. 309, 323.

[14] 8 Ad. & E. 743, 744.

[15] 13 C.B.N.S. 418.

[16] 1 Q.B.D. 679.

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some fundamental difference between a "fund" and a debt, there can be no answer to the plaintiff's claim now. It is submitted that there is no distinction between a fund and a debt for this purpose. If one person owes another money and accepts instructions from that person to pay part or the whole of it to a third person, the third person has an action against him for money had and received if he does not pay.

The authorities do not support the defendant's submission that no claim on this ground has succeeded unless there was an actual fund and not merely a chose in action. In *Morrell* v. *Wootten*[17] the "fund" was a debt to a banker; in *Griffin* v. *Weatherby*[18] there was a debt arising out of a loan. There is nothing in *Walker* v. *Rostron*[19] or *Hamilton* v. *Spottiswoode*[20] contrary to the submission already made that the principle set out in Bowstead's Digest of the Law of Agency, 11th ed. (1951), p. 269, art. 128, applies whether what exists between an agent and his principal, i.e., persons in the position of the defendant and Yousuf, is an existing debt or some new money coming into the agent's hands from the principal. *Lilly* v. *Hays*[21] is not an authority for the proposition that there must be anything more than a debt. In that case a specific sum was paid before the direction by the principal to pay was in fact given. As to *Williams* v. *Everett*,[22] admittedly it is necessary to show that the defendant had funds in his hands at some stage, but the fact that he has them no longer is immaterial. *Crowfoot* v. *Gurney*[23] shows that even the subsequent bankruptcy of the principal does not affect the personal liability of the agent to pay the third party. Here clearly there was a fund in the hands of the defendant at the date when he paid the plaintiff the faulty cheque. He agreed to pay the plaintiff the money and told him that he would do so. That converts an equitable right on the part of the plaintiff into a legal one and gives him a right to sue at law of which he cannot be deprived because of anything which happened subsequently between the defendant and Yousuf.

If that submission be wrong, then this was an ordinary debt capable of equitable assignment which was in fact assigned by Yousuf to the plaintiff. The fact of the assignment was communicated to the plaintiff. He is the beneficial owner of the money and it is only equitable that he should receive it. After-events are not material, but if they are, then the settlement between Yousuf and the defendant was made at a time when Yousuf thought that the plaintiff had been paid. The plaintiff is entitled to recover.

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[17] 16 Beav. 197.
[18] L.R. 3 Q.B. 753.
[19] 9 M. & W. 411.
[20] 4 Ex. 200.
[21] 5 Ad. & E. 548.
[22] 14 East 582.
[23] (1832) 9 Bing. 372.

Cur. adv. vult.

December 6. BARRY J. stated the facts and continued: On these facts Mr. Littman contends that the plaintiff is entitled to recover this sum on a claim for money had and received. As an alternative, he seeks to base his claim to that sum of money upon an equitable assignment; or, as a further alternative, he seeks to recover the sum of £500 as damages for breach of a contract to return the incorrectly drawn cheque to the defendant, the defendant agreeing to send back that cheque properly drawn, or replace it with another cheque properly drawn for the sum of £500. In whatever technical language the claim is garbed, its real essence is a claim for money had and received, and if this claim be unfounded, the plaintiff, in my opinion, should not be entitled to recover.

It is, I think, unnecessary for me to refer to many of the authorities which were cited to me in the course of the argument. There can, I think, be no doubt that the law on this subject was correctly stated by Blackburn J. in *Griffin* v. *Weatherby*.[1] Blackburn J. used these words[2]: "Ever since the case of "*Walker* v. *Rostron*[3] it has been considered as settled law that "where a person transfers to a creditor on account of a debt, "whether due or not, a fund actually existing or accruing in the "hands of a third person, and notifies the transfer to the holder of "the fund, although there is no legal obligation on the holder to "pay the amount of the debt to the transferee, yet the holder "of the fund may, and if he does promise to pay to the transferee, "then that which was merely an equitable right becomes a legal "right in the transferee, founded on the promise; and the money "becomes a fund received or to be received for and payable to "the transferee, and when it has been received an action for "money had and received to the use of the transferee lies at his "suit against the holder."

Mr. Boydell, on the defendant's behalf, does not seek to challenge that statement of the law. The basis of his argument was that in the present case there was not at any material time a "fund" in the hands of the defendant, and in the absence of such a "fund," he contends that no action for money had and received will lie.

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[1] (1868) L.R. 3 Q.B. 753.
[2] Ibid. 758.
[3] (1842) 9 M. & W. 411.

Apart from this one point, to which I shall shortly refer, I am satisfied that the evidence establishes a legal right on the part of the plaintiff to recover this sum of £500 or 500 dinars. The plaintiff was not, it is true, a "creditor" of his brother Yousuf, but he was in truth the recipient of a gift from either Yousuf or Haroun. This fact cannot, I think, be material. I can find nothing in principle, or in any of the authorities cited to me, which suggests the need for consideration as between the transferee and the transferor of the fund which the transferee is seeking to recover. It is clear from the evidence that Yousuf desired to transfer this money, and did in fact transfer it to the plaintiff, by his instructions, which were imparted to and accepted by the defendant himself. Subsequent to the receipt and acceptance of these instructions, the defendant, in my judgment, clearly promised to pay that sum of money to the plaintiff. No other construction can, I think, be placed upon his letter dated December 12, 1952, and upon his wrongly dated letter enclosing a cheque for £500, which either "belongs to you" or "is due "to you" (according to which of the two translations be adopted).

In these circumstances, if a "fund" existed in the defendant's hands at the time when he accepted Yousuf's instructions and made this promise to pay the plaintiff, then the plaintiff acquired a legal right to recover from the defendant the money transferred to him by his brother. This right, if it existed, could not be defeated by any subsequent dealing between Yousuf and the defendant.

As I understood Mr. Boydell's argument, he submitted that no debt owing by a third person can constitute a "fund" or become subject to the principle enunciated by Blackburn J. in *Griffin* v. *Weatherby*.[4] A fortiori, he suggests that when the debt consists of a mere temporary debit balance in a running account, as was the debt due from the defendant to Yousuf, such a debt cannot possibly be regarded as a fund to which this principle can apply.

Although the argument largely turned upon it, there is, of course, no magic in the word "fund"; nor is it to be regarded as though it were a word used in a statute. It was clearly chosen by Blackburn J.[4] not as a term of art but as a word which aptly fitted the facts which were then under consideration.

[4] L.R. 3 Q.B. 753, 758.

The problem, therefore, does not concern the meaning of this particular word but the nature of the fundamental requirement which, other conditions being satisfied, will enable the doctrine enunciated by Blackburn J.[4] to operate in favour of the transferee.

An identifiable sum of money entrusted to a third party in order that he, the third person, should hand it over to a transferee, or indeed for any other purpose, is, I think, most certainly not required. To take two examples, the so-called "fund" in *Walker* v. *Rostron*[5] consisted of the proceeds of the sale of goods purchased by the transferor from the transferee, which were in the hands of the third person, the transferor's agents, for the purpose of resale.

Again, in *Hamilton* v. *Spottiswoode*[6] the "fund" was represented by moneys which would become owing to the transferor for goods to be supplied by him in the future to the third person who had been instructed to pay them—or part of them—to the transferee and had promised the transferee that he would do so.

In my judgment, all that the law requires is that there must be in the hands of or accruing to the third person, either a sum of money, or a monetary liability, over which the transferor has a right of disposal. It matters not, I think, from what source the liability arises, and I see no reason why it should not include a debt for money lent, or goods sold, or services rendered, or a debt of any other kind; nor do I think that the situation can be altered if the debt is of a temporary nature, which in the ordinary course of things would shortly be extinguished by items of contra account, provided, of course, that the debt still exists at the date of the transfer and of the debtor's promise of payment made to the transferee.

Mr. Boydell urged upon me the inconvenience and possible injustice which might be involved in treating a temporary debt of this nature as a "fund" which the transferee could recover in an action for money had and received. The short answer to this argument seems to be that the debtor is not bound to accept the transferor's instructions, or, still less, is he bound to make any promise of payment to the transferee. If he does promise, as I see it, he has only himself to blame.

Mr. Boydell also suggested that in the present case it would be a grave hardship for the defendant if he were now compelled to pay £500 to the plaintiff. Even if this were true, it cannot, of course, affect the law, which must be administered as it is;

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[4] L.R. 3 Q.B. 753, 758.

[5] 9 M. & W. 411.

[6] (1849) 4 Ex. 200.

but naturally the court will scrutinize with particular care any suggested rule of law which appears to result in an injustice. Here I am satisfied that the interpretation of the law which I adopt results in no injustice of any kind. It is said that the defendant would never have entered into the deed of settlement with Yousuf if he had been aware of his liability to the plaintiff. He was, however, fully aware of all the material facts when he made the settlement, and if he misapprehended his legal position I am afraid he has again only himself to blame.

It is suggested by the plaintiff that in the settlement Yousuf has in fact given credit to the defendant for a sum of £500, in that the defendant's real indebtedness to Yousuf in November, 1952, was 1,800 and not 1,300 dinars. There is, however, no evidence of any kind to support that suggestion; but, should it be true, it could be said with equal force that Yousuf would not have made the settlement had he known that the defendant had failed to pay the £500 to his brother. The evidence clearly establishes that by February 2 that information had not been imparted to Yousuf. Incidentally, I am not concerned with subsequent transactions between the defendant and Yousuf. If there be any dispute between Yousuf and the defendant about those subsequent transactions, that dispute must, I think, be settled by Iraqi law.

It is sufficient for me to say that I find the plaintiff is entitled to recover £500 from the defendant as money had and received.

In view of this finding, I need not consider in detail the two other causes of action upon which Mr. Littman relied. However, in deference to the arguments addressed to me, I should perhaps state my views in very general terms. Mr. Littman failed to satisfy me that the plaintiff could recover as an equitable assignee, if only because there was no evidence that notice of the assignment had in fact been given to him. Yousuf's letters certainly give no hint that he, Yousuf, had assigned to the plaintiff any moneys owing to him by the defendant.

I also reject the alternative claim for damages for breach of contract. I do so on the ground that the nature of the arrangement made with regard to the return and alteration of the cheque and the whole surrounding circumstances should lead the court to infer that the parties did not intend to enter into any legal obligation independent of the obligation which gave rise to the sending of the cheque. It is, I think, absurd to suppose that the intention of the parties was that the defendant would be in breach of any contractual obligation if he, for example, had sent the

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£500 in cash instead of amending and returning the original cheque or sending another cheque to replace it. Other equally astonishing results would follow if an arrangement made under circumstances of this kind were to be given the status of an independent and legally enforceable agreement.

I prefer to reject this suggested claim on this ground rather than upon any lack of consideration. If the proper inference was that the parties had intended to create a legal obligation, no doubt Mr. Littman's ingenuity could discover a consideration which in law might be considered sufficient. In the result there must be judgment for the plaintiff for the sum of £500.

Judgment for plaintiff.

Solicitors: *Teff & Teff; Kinch & Richardson for Linder, Myers & Pariser, Manchester.*

E. M. W.

BATHAVON RURAL DISTRICT COUNCIL *v.* CARLILE.

[Plaint No. N. 661.]

C. A.

1958
Feb. 10, 24.

Hodson and Pearce L.JJ. and Upjohn J.

Housing—Rent—Scheme by local authority—Review increasing rent—Whether operating ipso facto—Whether local authority entitled to override tenants' contractual rights without notice to quit—Housing Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *s.* 85 (6).

Landlord and Tenant — Notice to quit — Form — Time of expiry—Periodic tenancy—Weekly tenancy to Sunday midnight—Notice to quit " by noon on Monday, July 1, 1957."

The defendant became the tenant of a dwelling-house owned by the plaintiff council on a Monday in 1955 at a rent of £1 5s. 7d. It was a contractual weekly tenancy terminable by either side giving one week's notice in writing before noon on any Monday. In August, 1956, the council gave notice to the tenant by letter that they had decided to operate, as from April 1, 1957, a differential rent scheme and that the rent of the defendant's house would be increased by 12s. a week. The defendant did not pay the extra rent and the council gave him notice to quit " by noon " on Monday, the first day of July, 1957." The defendant remained in occupation and proceedings by the council for possession of the house, arrears of rent and mesne profits were dismissed by the county court. It was argued that the weekly tenancy ran from Monday to Sunday midnight. On appeal:—

Held, (1) that a review of rents under section 85 (6) of the Housing Act, 1936,[1] does not make a tenant liable, ipso facto, for an altered rent. In the case of periodic tenancies the right of the tenant is to enter into and remain in occupation until he receives notice to quit, and until the landlord by a positive act exercises his right to terminate the tenancy the original contract persists. There is nothing in section 85 which gives the authority power to override the contractual rights and obligations of the parties, and the powers and duties of the authority can only be exercised in accordance with the general law, which required the tenancy to be determined lawfully by a notice to quit before a new tenancy at a different rent could be created.

Newell v. *Crayford Cottage Society* [1922] 1 K.B. 656; 38 T.L.R. 355 and dictum of Lord Sumner in *Kerr* v. *Bryde* [1923] A.C. 16, 31; 39 T.L.R. 61 applied.

(2) That since a notice to quit was bad if it did not expire at the proper time, which in the case of a periodic tenancy was the end of the current period, in this case Sunday midnight, the words "by "noon on" Monday rendered the notice invalid, and the appeal failed.

Dictum of Lord Campbell C.J. in *Page* v. *Moore* (1850) 15 Q.B. 684, 687 applied.

Queen's Club Garden Estates Ltd. v. *Bignell* [1924] 1 K.B. 117; 39 T.L.R. 496 considered.

Sidebotham v. *Holland* [1895] 1 Q.B. 378; 11 T.L.R. 154 distinguished.

Decision of Judge Elder Jones approved.

APPEAL from Judge Elder Jones, sitting at Bath County Court.

On Monday, March 28, 1955, the defendant, T. H. Carlile, became the tenant of a dwelling-house, 53, Frederick Avenue, Peasedown, near Bath, owned by the plaintiffs, the Bathavon Rural District Council. It was a contractual weekly tenancy, the general conditions being printed on a rent card, as follows: "The rent is due in advance on Monday in each week and no "arrears will be allowed. . . . The tenancy may be terminated "by either side by the giving of one week's notice in writing "before 12 noon on any Monday." The rent was fixed at £1 5s. 7d. a week. It was not disputed that the weekly tenancy ran from Monday until Sunday midnight.

By a letter dated August 21, 1956, the council gave notice to the tenant that they had decided as from April 1, 1957, to operate a differential rent scheme and purported to increase the defendant's rent by 12s. a week as from that date. The defendant did not pay the additional rent and therefore the council served him with a notice to quit dated June 14, 1957, in the following terms: "Notice to quit, to Mr. T. H. Carlile, 53 Frederick "Avenue, Peasedown St. John. I hereby give you notice to "quit and deliver up the premises . . . by noon on Monday, the "first day of July, 1957."

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[1] Housing Act, 1936, s. 85: "(6) "The authority shall from time to time review rents and make such "changes, either of rents generally or "of particular rents, and rebates (if "any) as circumstances may require."

The defendant continued in occupation of the house, and the council applied to the county court for an order for possession, arrears of rent and mesne profits. The order was refused, and the council appealed.

Harold Williams Q.C. and *W. M. Huntley* for the council. The council relies on the terms of section 85 (6) of the Housing Act, 1936, as giving them authority to review rents, so as to make the tenant liable, ipso facto, once the review has been made, for an altered rent. It is submitted that it was not necessary to give any notice to quit; that the council, under its statutory powers, fixes rents and rebates. The subsection imposed a duty as well as conferred a power, and it cannot be right to say that the lease must be determined before any increased rent can be imposed. Notice to quit has in fact been served, expiring at noon on a Monday. It is agreed that the tenancy ended at midnight on Sunday, and not on the Monday following, and therefore it is contended that on its true construction the notice expired at midnight on the Sunday, notwithstanding the words "by noon "on Monday." A notice expressed to end on the day following the expiration of the period of notice can be a good notice: *Sidebotham* v. *Holland* [2] and *Crate* v. *Miller*.[3] It could not, it is submitted, be rendered bad by the addition of the words "by "noon," which contained a licence for the tenant to continue in occupation until noon on the following day.

R. E. Megarry Q.C. and *G. A. Forrest* for the tenant. Section 85 of the Housing Act, 1936, contemplates that there will be a contract. When Parliament gives a power or duty to a local authority it is well established that the authority can only exercise its power according to the general law of the land, unless there is in the statute something to authorize a breach of the general law. The effect of subsection (6) of section 85 is to negative any fixity of rent and to impose a duty on a local authority to make changes from time to time. The tenant in this case relies on the passage in the speech of Lord Sumner in

[2] [1895] 1 Q.B. 378, 383.

[3] [1947] K.B. 946.

Kerr v. *Bryde.*[4] There is nothing in the Housing Act which corresponds with section 3 (2) of the Rent Act, 1939, and it does not carry the council anywhere. The burden is on the local authority to show that the notice to quit expires at the right moment. The correct moment is the end of a period of the tenancy. *Lemon* v. *Lardeur*[5] carries both those points. The landlord must take the date of determination of the tenancy and give notice accordingly. The judge below rightly held the notice to quit to be bad.

[*Shelley* v. *London County Council*[6] and *Metropolitan Asylum District* v. *Hill*[7] were also cited in argument.]

Cur. adv. vult.

February 24. HODSON L.J. read the judgment of the court, in which he stated the facts and continued: The contention of the council was that the notice of August 21, 1956, had the effect of raising the rent of the house so as to make it recoverable in law by virtue of the Housing Act, 1936, without any variation of the terms of the contract. Section 83 (1) gives power to the authority to make such weekly charge for the tenancy or occupation of the houses as they may determine. Section 85 (5), which is no longer in force, read: "In fixing rents the authority shall "take into consideration the rents ordinarily payable by persons "of the working classes in the locality, but may grant to any "tenant such rebates from rent, subject to such terms and "conditions, as they may think fit." Section 85 (6) reads: "The "authority shall from time to time review rents and make such "changes, either of rents generally or of particular rents, and "rebates (if any) as circumstances may require"; and section 85 (7): "The authority shall make it a term of every letting that the "tenant shall not assign, sublet or otherwise part with the "possession of the premises, or any part thereof, except with "the consent in writing of the authority, and shall not give such "consent unless it is shown to their satisfaction that no payment "other than a rent which is in their opinion a reasonable rent "has been, or is to be, received by the tenant in consideration of "the assignment, subletting or other transaction."

The council relies upon the terms of section 85 (6) as giving authority to review rents so as to make the tenant liable ipso facto, once the review has been made, for an altered rent. We agree with the county court judge that this view of the Act is not tenable. In the case of periodic tenancies, the right of the tenant is to enter into and remain in occupation until he receives notice to quit; and until the landlord by a positive act exercises his right to terminate the tenancy the original contract persists. The subsection imposes a duty on the authority to review rents and make such charges as may be necessary in the interests of such authority itself and of the tenant, and also negatives the possible inference which could be drawn from the preceding subsection that rents once fixed were not open to review. It makes no provision for any form of notice, so that if the authority's contention is correct, the rent could be raised forthwith by the authority and could run at some higher figure before any notice was given to the tenant. Further, the tenant would be bound to continue at the higher rent until such time as he could give a valid notice to the landlord determining his tenancy. There is nothing in the section which gives the authority power to override the contractual rights and obligations of the parties. That the letting is contractual is not disputed and is borne out by the language of section 85 (7) which has been read. Unless Parliament has otherwise provided, the powers and duties of the authority can only be exercised in accordance with the general law, which in this matter requires the tenancy to be determined lawfully by a notice to quit before a new tenancy at a different rent can be created.

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[4] [1923] A.C. 16, 31.

[5] [1946] K.B. 613, 616.

[6] [1949] A.C. 56; 64 T.L.R. 600; [1948] 2 All E.R. 898.

[7] (1881) 6 App.Cas. 193.

This is not the first time that a problem of this character has fallen to be decided. Under the Rent Restrictions Acts permitted increases of rent may be made, and it was decided in *Newell* v. *Crayford Cottage Society*[1] that a condition precedent to the making of such increase was the termination of an existing contract of tenancy by notice to quit. This decision was approved by the House of Lords in *Kerr* v. *Bryde*.[2] It is true that in the House of Lords opinion was divided, but the argument which caused the difficulty was based on the particular words of section 3 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which referred to the landlord's right to increase rent being dependent, not on whether he would be entitled to possession but whether he would be entitled to obtain possession. No such difficulty appears in the instant case, and the language of Lord Sumner is apt to fit the question which this court has now to consider. He said[3]: "I can find nothing "either in the language or the policy of this legislation to show "that it was intended to permit a landlord to raise a rent during "a period in which under an existing contract, however arising, "he was not entitled to do so, or was only entitled to do so "after a notice had been given and had expired. Wherever the "tenant has, for a time which is or can be made certain, the "right to hold possession at a given rent, these Acts do not seek "to take away that right." We should add that the necessity of giving a formal notice to quit in Rent Act cases is now abolished by the Rent Restrictions (Notice of Increase) Act, 1923, in cases where notice to increase rent is duly given.

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[1] [1922] 1 K.B. 656; 38 T.L.R. 355.

[2] [1923] A.C. 16; 39 T.L.R. 61.

The second question raised by the appeal is highly technical and depends on the validity of a notice to quit dated June 14, 1957, which is in the following terms: It is headed with the council's name, "Notice to quit, to Mr. T. H. Carlile, "53 Frederick Avenue, Peasedown St. John. I hereby give "you notice to quit and deliver up the premises known as "53 Frederick Avenue, Peasedown St. John, near Bath, by noon "on Monday, the first day of July, 1957. Dated this fourteenth "day of June, 1957" (a Friday), signed by the clerk of the council. If the notice was good, and not otherwise, the council is entitled to judgment for mesne profits as claimed from July 1, 1957, to the date of the hearing.

It was contended by the council that on the true construction of the notice, it being agreed that the tenancy ended on Sunday night and not on the Monday following, the notice expired at the same time as the tenancy notwithstanding the words "by noon "on Monday, July 1, 1957." A. L. Smith L.J. said, in *Sidebotham* v. *Holland*[4]: "It cannot be denied that the law upon "notices to quit is highly technical; but the technicalities are too "deeply rooted in our law to be now got rid of." This question depends upon such a technicality, which can be justified because a notice to quit is a unilateral act determining a tenancy without the consent of the opposite party and as such must be strictly construed. The rule of law is that a notice to quit is bad which does not expire at the proper time. The opinion of Lush J. in *Queen's Club Garden Estates Ltd.* v. *Bignell*[5] that the true view was that in any periodic tenancy, whether it be yearly, quarterly, monthly or weekly, the notice to quit must expire at the end of the current period was expressly approved by the Court of Appeal in *Lemon* v. *Lardeur*.[6] It is scarcely necessary to point out that the trap laid by this technicality is commonly avoided by the addition of words to the effect that if the date mentioned is not the real date on which the period expires, then the notice to quit is to expire on the proper day of expiry next after the expiration of the current period.

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[3] [1923] A.C. 16, 31.

[4] [1895] 1 Q.B. 378, 388; 11 T.L.R. 154.

[5] [1924] 1 K.B. 117, 124; 39 T.L.R. 496.

The next matter to consider is whether a notice expressed to end on the day following the expiration of the period can be good. The answer is "Yes" and is to be found in *Sidebotham* v. *Holland*[7] and in a later decision of the Court of Appeal in *Crate* v. *Miller*.[8] In the former case, which concerned a yearly tenancy, Lindley L.J. delivered a judgment in which Lord Halsbury concurred, A. L. Smith L.J. doubting, but not dissenting. The tenancy there began on May 19 and a notice to quit on May 19 was held to be good, that being the anniversary of the commencement of the term. There is a passage in the judgment of Lindley L.J. which contains this language[9]: "The "validity of a notice to quit ought not to turn on the splitting "of a straw. Moreover, if hypercriticisms are to be indulged in, "a notice to quit at the first moment of the anniversary ought "to be just as good as a notice to quit on the last moment of "the day before. But such subtleties ought to be and are dis- "regarded as out of place." This passage supports the contention that the notice in this case is not rendered bad by expiring on Monday, for, as Lindley L.J. pointed out, a notice to quit on the first moment of the anniversary ought to be just as good as a notice to quit on the last moment of the day before, although he continued by saying that such subleties should be and were disregarded as out of place, no doubt on the principle of de minimis non curat lex. However, since the decision of this court in *Crate* v. *Miller*,[10] also the case of a weekly tenancy, it seems clear that the true explanation of this principle is not de minimis non curat lex, but that the court construes a notice given for the anniversary as a notice expiring at the first moment of the anniversary. Somervell L.J. there delivered the judgment of the court and applied the decision of *Sidebotham* v. *Holland*[11] to a weekly tenancy, holding that a weekly tenancy which begins on Saturday and ends on Friday may be determined validly by the landlord giving either a notice to quit on Friday or a notice to quit on Saturday, for in either case the notice is properly construed as a notice to quit when the current week ends, for a notice to quit on the last day of the current period and a notice to quit on the day after that day are both equally intimations that the last day of the current period is the last day of the tenancy.

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[6] [1946] K.B. 613, 616; 62 T.L.R. 600; [1946] 2 All E.R. 329.

[7] [1895] 1 Q.B. 378, 383.

[8] [1947] K.B. 946; 63 T.L.R. 389; [1947] 2 All E.R. 45.

[9] [1895] 1 Q.B. 383.

[10] [1947] K.B. 946.

[11] [1895] 1 Q.B. 378.

The council argued upon these authorities that if notice expiring on Monday is good, it could not be rendered bad by the addition of the words "by noon." The answer is that while "Monday" without more can be construed (as the authorities show) as meaning the first moment of the day (the preceding midnight), "by noon on Monday" cannot be so construed. The council seeks to escape from this conclusion by reading the notice as if it expired at midnight and contained a licence to continue in occupation until noon of the following day: compare Salter J.'s consideration of such a possibility in the *Queen's Club Garden* case.[12] The words will not, however, bear this construction, for the words "by noon on Monday" are expressed to mark the expiration of the notice itself and there is no room for a licence to remain on the premises after the expiration of the tenancy. The Council cannot, in our judgment, avoid this conclusion by treating the words "by noon" as surplusage which can be disregarded. Such an attempt failed in *Page* v. *Moore*,[13] which was considered in *Sidebotham* v. *Holland*.[14] This was an action for double value under the Landlord and Tenant Act, 1730, s. 1, for holding over after a notice to quit. We recognize that this statute was of a penal nature and Lindley L.J., in *Sidebotham's* case,[14] treated the decision in *Page* v. *Moore* [15] as authoritative only in an action for double rent (sic, value) when it was necessary to be more particular. The tenancy was from year to year, expiring on December 25, and the notice was expressed so as to demand surrender of the premises at 12 o'clock noon on December 25, 1847. The court refused to reject the words "12 o'clock at noon" so as to make the notice good, and Lord Campbell C.J. said [16]: "The defendant, holding as he did, was "entitled to keep possession until midnight on December 25. . . . "The defendant is told that, in the event of his not 'so surrender-"'ing,' that is at 12 noon, the plaintiff will demand rent at 7s. a

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[12] [1924] 1 K.B. 117, 133.
[13] (1850) 15 Q.B. 684.
[14] [1895] 1 Q.B. 378.
[15] 15 Q.B. 684.
[16] Ibid. 687.

"day till he can obtain possession. How can that be a demand "of possession at the time when the tenancy expires? . . . I "can see no difference between a wrong day and a wrong hour "of the day: a demand for the 24th would have been insufficient; "and this is equally so."

The language of the Lord Chief Justice applies with great force to a notice of such short duration as a week as compared with the six months' notice which he was considering. We agree with the county court judge on both points and would dismiss the appeal.

Appeal dismissed.

Solicitors: *Church, Adams, Tatham & Co. for D. M. Woodward, Bath; Knapp-Fisher, Wartnaby & Blunt for Faulkner, Creswick & Gould, Midsomer Norton, near Bath.*

A. W. G.

PTEROTI COMPANIA NAVIERA S.A. *v.* NATIONAL COAL BOARD.

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Feb. 19.

Diplock J.

[1957 P. No. 2038.]

Shipping—Charterparty—Demurrage—Lay time—Commencement—Discharge of cargo begun prior to notice of readiness—Commencement of lay time.

Clause 8 of the Americanized Welsh Coal Charter, in making provision for the calculation of lay time, provides: "Time to "commence 24 hours . . . after vessel is ready to unload and "written notice given. . . ." The defendants, the charterers, began discharging their cargo from the plaintiffs' ship as soon as the vessel berthed. A few hours later a notice of readiness to unload was served on the charterers which expired 24 hours later. The owners claimed that lay time began to run from the time when the charterers began to discharge the vessel, while the charterers claimed that time did not begin until the expiry of the notice of readiness:—

Held, that on the construction of clause 8, time began to run 24 hours after notice of readiness was served, and on the facts of the case there was no waiver of clause 8 by the charterers and no implied term that lay time was to commence earlier than as provided for in clause 8.

James Nelson & Sons Ltd. v. *Nelson Line (Liverpool) Ltd.* [1908] A.C. 108; 24 T.L.R. 315 considered.

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ACTION.

The following facts were agreed between the parties: By a charterparty in the form of the Americanized Welsh Coal Charter dated September 29, 1955, concluded between A. Lusi Ltd., as agents for the shipowners, Pteroti Compania Naviera S.A., and Cory Brothers & Co. Ltd., as agents for the charterers, the National Coal Board, the owners agreed to charter to the charterers vessels to be nominated totalling not exceeding 1,265,000 nor less than 1,035,000 tons net register for the carriage of full and complete cargoes of coal not exceeding 10,450 nor less than 8,550 tons from Baltimore or Hampton Roads to one safe port in the United Kingdom or Continent.

Clause 3 of the charterparty provided: "The cargo to be "loaded into vessel at the average rate of 1,500 tons per running "day, of 24 hours, (excluding bunkering time, Sundays . . . "holidays, and from noon on Saturday or the day previous to "any such holiday to 7 a.m. on Monday or the day after any "such holiday, unless used in which event only time actually "used in loading cargo to count) commencing 24 hours after "vessel tenders and is ready to load, unless sooner berthed, "whereupon time is to commence and written notice is given of "the vessel's being completely discharged of inward cargo and "ballast in all her holds and ready to load, such notice to be "given between business hours of 9 a.m. and 5 p.m., or 9 a.m. "and 1 p.m. on Saturdays . . ."

Clause 8 of the charterparty provided: "The cargo to be taken "from alongside by consignee at port of discharge, free of expense "and risk to the vessel, at the average rate of 2,500 if Antwerp, "Rotterdam or Amsterdam or 1,500 if U.K. tons per day, weather "permitting, Sundays and holidays and after noon on Saturdays "excepted, provided vessel can deliver it at this rate. If longer "detained, consignee to pay vessel demurrage at the rate of "£300 Br. Stg. per running day (or pro rata for part thereof). "If sooner dispatched, vessel to pay charterer or his agents "£150 Br. Stg. per day (or pro rata for part thereof) dispatch "money for working time saved. Time to commence twenty-"four (24) hours, Sundays and holidays excepted, after vessel "is ready to unload and written notice given, whether in berth "or not, and the time allowable for discharging to be calculated "on the basis of the bill of lading quantity. In case of strikes, "lockouts, civil commotions, or any other causes or accidents "beyond the control of the consignee which prevent or delay "the discharging, such time is not to count unless the vessel is "already on demurrage. Consignee to effect the discharge of the "cargo, vessel providing only steam, steam-winches, winchmen, "gins and falls."

The *S.S. Khios Breeze* was nominated on behalf of the owners and accepted on behalf of the charterers to carry out the voyage under the charterparty, and the vessel loaded 9,705 tons 1,000 lb. at Hampton Roads. In accordance with the charterparty the master applied to the charterers by wireless about 96 hours before the vessel arrived off Land's End for orders as to the port of discharge and the charterers thereupon ordered the vessel to discharge at Rotterdam. The master thereupon informed the charterers by wireless of his estimated time of arrival at Rotterdam. On the basis of the cargo of 9,705 tons 1,000 lb., and the daily discharging rate of 2,500 tons as provided in clause 8 of the charterparty, the vessel's lay time for discharging was 3 days 21 hours 10 minutes. At 0200 hours on Wednesday, July 18, 1956, the vessel berthed at Waalhaven Quay, Rotterdam, which was her discharging berth. The vessel was then in free pratique and in every respect ready to discharge. At 0230 hours on the same day the charterers' agents began to discharge the vessel. The shipowners' servants on board the vessel assisted in the discharge in the usual manner and raised no objection to the discharge commencing at the aforesaid time. At 0900 hours on Wednesday, July 18, the shipowners' Rotterdam agents tendered a notice of readiness to the charterers' Rotterdam agents, which the latter accepted. According to clause 8 of the charterparty the notice of readiness expired at 0900 hours on Thursday, July 19. The vessel's discharge proceeded continuously from 0230 hours on Wednesday, July 18, until 2345 hours on Friday, July 20, when the discharge was completed.

The shipowners contended that on the above facts the vessel's lay time for discharging of 3 days 21 hours 10 minutes began at 0230 hours on Wednesday, July 18, and that the charterers were therefore entitled to dispatch money in respect of 23 hours 55 minutes, which was equal to £149 9s. 7d. at the daily rate of £150 provided in clause 8. The charterers contended that on the facts the vessel's lay time commenced at 0900 hours on Thursday, July 19, and that the charterers were therefore entitled to dispatch money in respect of 2 days 6 hours 25 minutes, which was equal to £340 2s. 1d. The charterers had deducted £340 2s. 1d. on account of dispatch money from the freight payable in respect of the voyage. The shipowners in the present action claimed £190 12s. 6d. (and interest thereon) being the difference between £340 2s. 1d. and £149 9s. 7d.

Eustace Roskill Q.C. and *Michael Kerr* for the shipowners. This case raises a short point: whether lay time counts from the time when a vessel actually begins loading or discharging if this happens before notice of readiness can be given and before it expires, or whether it only counts from the expiry of the notice.

The obligation on the owners to give notice of readiness is an obligation imposed solely for the charterers' benefit. The owners are not contractually bound to assist in the unloading until notice is given and lay time has begun. They may send their crew on a holiday if they so wish. The charterers by requiring cargo to be delivered earlier are waiving their right to notice of readiness before they start to unload. Had the master given no notice, then if the owners' argument is wrong on this point, the charterers would receive no dispatch money at all. It would be an unreal result if the shipowners could deprive the charterers of money for speedy dispatch. There is authority that charterers can waive a cesser clause (*Rederi Aktiebolaget Transatlantic* v. *Board of Trade* [1]), and if they can do that, then by parity of reasoning they can say: "We are going to conduct ourselves "in such a way that we do not require notice of readiness to "make us aware of the presence of the vessel." [Reference was made to Scrutton on Charterparties, 16th ed., p. 150, in particular footnote (*e*), Carver's Carriage of Goods by Sea, 10th ed., p. 862, in particular footnote 19, *Kawasaki Kisen Kabushiki Kaisha* v. *Bantham S.S. Co. Ltd.* [2] and *Franco-British S.S. Co. Ltd.* v. *Watson & Youell.* [3]]

It may be that the charterers are entitled to delivery up of their cargo the moment that it arrives because, otherwise, the shipowners are liable in detinue. But if they demand delivery, as in the present case, the charterers waive the shipowners' obligation to give notice of readiness. Notice of readiness is only relevant for the purpose of informing the charterers of the vessel's arrival and of enabling them to make preparations for the loading or discharging. At common law, in the absence of an express clause, there is no obligation to give a notice of readiness at the discharging port. The clause is therefore wholly for the benefit of the charterers. It is important to distinguish between the

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[1] (1924) 30 Com.Cas. 117.

[2] [1938] 1 K.B. 805; 54 T.L.R. 436.

[3] (1921) 9 Ll.L.R. 282.

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charterers' rights and the shipowners' obligations. The obligation of the charterers to do their part in the loading or discharging is subject to the condition precedent that the owners have given notice, but it is always open to a party in whose favour the condition is made to waive the condition precedent.

That is the simplest way to put the case on behalf of the shipowners, but it can also be put as an implied term. *The Katy*[4] established that parties can by their conduct in loading or discharging produce the result that time counts as lay time although otherwise it would not have so counted. In *James Nelson & Sons Ltd.* v. *Nelson Line* (*Liverpool*) *Ltd.*[5] the House of Lords refused to infer an agreement that certain time should count, where there was an express term in the contract excepting the time in question, but that is not the same as the present case, since the time was not excepted time. *Nelson's* case[5] was not concerned with waiver.

A. A. Mocatta Q.C. and *S. O. Olson* for the charterers. This is a matter of construction, and the words of clause 8 of the charterparty are quite clearly in favour of the charterers' contention. The right approach to this contract must be to look at what the parties have agreed, and there can be no doubt that what appears in clause 8 of this charterparty does cover this case on these facts. Clause 8 enables one to calculate permissible lay time. There are two provisions in that clause, a 24-hour period after (a) the ship is ready and (b) notice of readiness has been given. Notice of readiness was given in the present case. If the charterer waived the notice there would still be the period of 24 hours after the ship was ready. The shipowners are trying to read into clause 8 some extra words like "unless discharge "begins earlier," for which there is no justification; compare "unless used" in clause 3 as regards loading. [Reference was made to *Burnett S.S. Co. Ltd.* v. *Olivier & Co. Ltd.*[6] and *Horsley Line Ltd.* v. *Roechling Brothers.*[7]]

If the shipowner's argument succeeds on waiver and he is right that the notice is purely for the charterer's benefit, he is still faced with the problem that time does not run until 24 hours after the ship is ready to unload, which point only arises in the alternative and would make a reduction of some £40 in the claim. The shipowners fail unless the court is persuaded that the clause was solely for the charterers' benefit and that it was a reasonable inference on the facts that there was an agreement. If there

[4] [1895] P. 56; 11 T.L.R. 116.

[5] [1908] A.C. 108; 24 T.L.R. 315.

[6] (1934) 48 Ll.L.R. 238.

[7] 1908 S.C. 866.

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was such an agreement it does not explain why notice of readiness was in fact given. Scrutton L.J. in *Verren* v. *Anglo-Dutch Brick Co. (1927) Ltd.*[8] said that *Nelson's* case[9] (which is indistinguishable from the present case) overruled *The Katy.*[10]

One cannot say that in the present case it was a necessary and reasonable inference of fact that there was any ground for altering clause 8. The fact that notice of readiness was given at the first moment when it could be given is conclusive. If no notice at all had been given, that would have been a breach of contract.

Roskill Q.C. in reply. A notice of readiness must relate to the ship's present state of readiness, not to a past or future state of readiness.

Diplock J. This is in form a claim for freight under a charterparty, but it raises a question as to the moment from which time is to run for the purpose of calculating demurrage or dispatch money (in this particular case dispatch money) under clause 8 of the Americanized Welsh Coal Charter. It seems to me that prima facie the first thing I have to do is to look at the charter and see what its words say and endeavour to construe it. I will accordingly start by reading clause 8. "The cargo to be "taken from alongside by consignee at port of discharge, free of "expense and risk to the vessel, at the average rate of 2,500 . . . "tons per day . . . weather permitting, Sundays and holidays "and after noon on Saturdays excepted, provided vessel can "deliver it at this rate. If longer detained, consignee to pay "vessel demurrage at the rate of £300 British sterling per "running day (or pro rata for part thereof). If sooner dispatched, "vessel to pay charterer or his agents £150 British sterling per "day (or pro rata for part thereof) dispatch money for working "time saved. Time to commence twenty-four (24) hours, Sun-"days and holidays excepted, after vessel is ready to unload and "written notice given, whether in berth or not, and the time "allowable for discharging to be calculated on the basis of the "bill of lading quantity. In case of strikes, lockouts, civil "commotions, or any other causes or accidents beyond the "control of the consignee which prevent or delay the discharging, "such time is not to count unless the vessel is already on "demurrage. Consignee to effect the discharge of the cargo,

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[8] (1929) 34 Ll.L.R. 210; 45 T.L.R. 556.

[9] [1908] A.C. 108.

[10] [1895] P. 56.

" vessel providing only steam, steam-winches, winchmen, gins " and falls."

The circumstances to which that clause in the charterparty has to be applied are set out in an agreed statement of facts, and I think I can summarize them by saying this. The charterparty related to a cargo of coal in the *S.S. Khios Breeze*. The cargo consisted of 9,705 tons 1,000 lb., and at the daily discharge rate of 2,500 tons provided for in clause 8 the lay time for discharge was 3 days 21 hours 10 minutes. The agreed statement of facts vouches for the accuracy of that figure. The vessel arrived at 2 o'clock in the morning of Wednesday, July 18, at Rotterdam, which was her discharging berth; and at 2.30 the defendants' agents started to discharge. At 9 o'clock on Wednesday the same day, which was the earliest moment possible under clause 8, the vessel's agents tendered a notice under clause 8 in the following terms: " Dear Sirs, *S.S. Khios Breeze*. On behalf " of the master we herewith declare that the above named vessel " arrived at her discharging berth at [0200] hours today, July 18, " 1956, being in free pratique and in every respect ready for her " discharging operations as from [0200] hours. Time to count " as per terms, conditions and exceptions of the charterparty " covering this voyage."

Owing to the modern discharging facilities available at Rotterdam, the discharge of the vessel, which started at 2.30 in the morning of Wednesday, July 18, continued until 11.45 at night on Friday, July 20, when the discharge was completed. The issue between the parties is: from what hour and day is time to run (or " to commence," which is the phrase used) for the purposes of clause 8? The contention of the charterers, the National Coal Board, is that it is to commence 24 hours after 9 a.m. on Wednesday, July 18, when notice of readiness was given: that is to say, that it was to start at 9 a.m. on Thursday, July 19. On that basis, having regard to the fact that the lay days extend over the week-end, the dispatch money, at £150 a day, comes to £340 2s. 1d.; and that amount the charterers deducted from the freight. The shipowners, on the other hand, contend that time should commence from the moment at which discharge in fact started, namely, 2.30 a.m. on July 18. Dispatch money on that basis is calculated at £149 9s. 7d.; and this action is brought by the shipowners to recover the difference between those two sums, as the charterers deducted the dispatch money, on their calculation, from the freight.

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I am told that this is the first time the question has arisen as to when time is to commence for the purpose of demurrage or dispatch money where the charterers in fact start unloading before a notice of readiness has expired; and it does appear from the cases which have been cited to me that there is none which is completely on all fours with this. On the other hand, it seems to me that the point is a short one, and I may be wrong but to me it is a simple one. It depends, as points of this kind must depend, on the true construction of the relevant contract and, in particular, clause 8 of that contract. The most relevant sentence of it is: "Time to commence twenty-four (24) hours, Sundays "and holidays excepted, after vessel is ready to unload and "written notice given, whether in berth or not, and the time "allowable for discharging to be calculated on the basis of the "bill of lading quantity." It seems to me that that sentence means what it says—that in order to find out when time starts one looks to see two things: first, when was the vessel ready to unload (and time must start at least 24 hours after that); and secondly, when was written notice given (and time must start at least 24 hours after that).

Therefore, applying this sentence and clause to the facts of this case, on the face of it it would appear that the charterers' contention is right. On what seems to me to be plainly the prima facie meaning of the clause, why should it not apply to this case? Mr. Roskill, I think, puts the matter in two ways. He says that the clause providing for notice, which includes also the provision about "time to commence 24 hours . . . after "vessel is ready to unload," is put in for the charterers' benefit alone: it is therefore one that can be waived by the charterers, and that when charterers start to unload before the time has commenced to run under that clause they waive their right to delay the starting of lay days until 24 hours from when notice of readiness to unload has expired. Alternatively, Mr. Roskill says that if it is not a case of waiver then there is an agreement to be implied between the charterers and the shipowners that time is to start from the time at which unloading in fact commences. The only evidence that there is either of agreement or of waiver is that in fact the charterers did start to unload at the time that I have stated and that the vessel's servants assisted in the operation in accordance with the provisions of the clause by providing steam, steam-winches, winchmen, gins and falls. I think that quite plainly no agreement can be construed out of those facts.

The case is not wholly similar, but I draw attention to the decision in the House of Lords in *James Nelson & Sons Ltd.* v. *Nelson Line* (*Liverpool*) *Ltd.*,[1] and to a dissenting judgment of Fletcher Moulton L.J.[2] in the Court of Appeal in the same case, which points out the principles on which the court should be prepared to infer agreements of that kind between the parties, and contains a warning against an easy inference of such agreements. I can see no ground whatever on which I could infer an agreement here that because the charterers started to unload, and the shipowners' servants assisted in doing so, at 2.30 in the morning there was an agreement between the parties that lay time should start then instead of at the time provided for (in my view) on the plain construction of clause 8. Equally I can see no grounds on which I should be entitled to hold that it had been waived by the charterers. It does not seem to me that either the clause relating to time commencing or the clause relating to notice is one which is put in solely for the benefit of the charterers; and I do not think that it is a clause to which waiver would apply in any event.

Mr. Roskill has sought to impress on me that the only advantage of starting to unload early accrues to the charterer because he gets his cargo quicker and he gets dispatch money or pays less demurrage. It seems to me that there is also an advantage to the shipowner in getting his vessel discharged as early as possible because he gets the use of his vessel. Whether one advantage outweighs the other in any particular case I do not know, and I do not think it matters. As I say, I think that there are advantages to both sides; and in those circumstances I am not prepared to infer any waiver of what I think are the plain terms of the clause itself.

I have had cited to me, by the industry of counsel, a number of cases on the fringe of the matter; and if I do not mention them in detail I hope it will not be thought that I have not derived benefit from reading them. But it does seem to me that I am engaged here in determining a question of construction. I do not think there is any particular magic about its being a charterparty in this case (except that one would seek to know the meaning of the technical terms involved); and it does not seem to me that the construction which other courts have put on different

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[1] [1908] A.C. 108; 24 T.L.R. 315.

[2] [1907] 2 K.B. 705, 712; 23 T.L.R. 302.

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PTEROTI COMPANIA NAVIERA S.A. v. NATIONAL COAL BOARD.

clauses in other charterparties really could or should constrain me to apply to this charterparty a construction which in my view would be contrary to its plain meaning.

This action accordingly fails.

Judgment for the defendants.

Solicitors: *Stokes & Mitcalfe; Donald H. Haslam.*

C. J. E.

C. A.

1957 *Nov.* 11, 12.

Jenkins, Parker and Pearce L.JJ.

FRANCIS *v.* YIEWSLEY AND WEST DRAYTON URBAN DISTRICT COUNCIL.

[1955 F. 2158.]

Town and Country Planning—Enforcement notice—Form—Validity of notice—Notice reciting development without permission—Permission for limited period granted by Minister—Effect of owner's failure to appeal to justices—Whether barred from questioning notice in High Court—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 23 (1) (2) (4), 24 (1) (3).

In February, 1949, the owner of land placed on the land caravans for residential purposes and applied to the local planning authority for permission to use the land for that purpose. Permission was refused, and the owner appealed to the Minister, who allowed the appeal to the extent of permitting the use of the land as a caravan site for six months from February 22, 1950. In 1952 the planning authority served on the owner an enforcement notice stating that "whereas . . . the land . . . was developed by placing thereon "caravans for residential purposes and whereas such development ". . . was carried out without the grant of planning permission "required under Part III of the Town and Country Planning Act, "1947.[1] Now therefore the" local planning authority "in exercise

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[1] Town and Country Planning Act, 1947, s. 23: "(1) If it appears "to the local planning authority that "any development of land has been "carried out after the appointed day "without the grant of permission "required in that behalf under this "Part of this Act, or that any "conditions subject to which such "permission was granted in respect "of any development have not been "complied with, then, subject to any "directions given by the Minister, "the local planning authority may "within four years of such development being carried out, if they "consider it expedient so to do "having regard to the provisions of "the development plan and to any "other material considerations, serve "on the owner and occupier of the "land a notice under this section. "(2) Any notice served under this "section (hereinafter called an "'enforcement notice') shall specify "the development which is alleged

"of the powers contained in sections 23 and 24 of the said Act "hereby give you notice to remove all caravans from the site within "55 days of the date on which this notice takes effect." In an action by the owner for a declaration that the enforcement notice was ineffective on the ground that planning permission as required by the Act had been granted and because the notice did not specify

"to have been carried out without "the grant of . . . permission . . . "or, as the case may be, the matters "in respect of which it is alleged "that any . . . conditions . . . "have not been complied with, and "may require such steps as may "be specified in the notice to be "taken within such period as may "be so specified for restoring the "land to its condition before the "development took place, or for "securing compliance with the con-"ditions, as the case may be; and "in particular any such notice may, "for the purpose aforesaid, require "the demolition or alteration of any "buildings or works, the discontinu-"ance of any use of land, or the "carrying out on land of any build-"ing or other operations. (3) Sub-"ject to the provisions of the next "following subsection, an enforce-"ment notice shall take effect at the "expiration of such period (not "being less than twenty-eight days "after the service thereof) as may be "specified therein: Provided that—(*a*) "if within the period aforesaid an "application is made to the local "planning authority under this Part "of this Act for permission for the "retention on the land of any "buildings or works, or for the con-"tinuance of any use of the land, "to which the enforcement notice "relates, the notice shall be of no "effect pending the final determina-"tion of that application. . . . "(*b*) if within the period aforesaid "an appeal is made to the court "under the following provisions of "this section by a person on whom "the enforcement notice was served, "the notice shall be of no effect "pending the final determination or "withdrawal of the appeal. (4) If "any person on whom an enforce-"ment notice is served under this "section is aggrieved by the notice, "he may, at any time within the "period mentioned in the last fore-"going subsection, appeal against "the notice to a court of summary "jurisdiction . . . (5) Any person "aggrieved by a decision of a court "of summary jurisdiction under the "last foregoing subsection may "appeal against that decision to a "court of quarter sessions."

S. 24: "(1) If within the period "specified in an enforcement notice, "or within such extended period as "the local planning authority may "allow, any steps required by the "notice to be taken (other than the "discontinuance of any use of land) "have not been taken, the local "planning authority may enter on "the land and take those steps, and "may recover as a simple contract "debt in any court of competent "jurisdiction from the person who is "then the owner of the land any "expenses reasonably incurred by "them in that behalf; and if that "person, having been entitled to "appeal to the court under the last "foregoing section, failed to make "such an appeal, he shall not be "entitled in proceedings under this "subsection to dispute the validity "of the action taken by the local "planning authority upon any "ground which could have been "raised by such an appeal . . . (3) "Where, by virtue of an enforce-"ment notice, any use of land is "required to be discontinued, or any "conditions are required to be com-"plied with in respect of any use of "land . . . then if any person, with-"out the grant of permission in that "behalf under this Part of this Act, "uses the land . . . in contravention "of the notice, he shall be guilty of "an offence. . . ."

the development alleged to have been carried out as required by section 23 (2) of the Act:—

Held, (1) that by virtue of the recitals contained in the enforcement notice, the notice sufficiently specified, for the purposes of section 23 (2) of the Act, the development alleged.

But (2) that the notice was invalid inasmuch as it contained a misstatement in the recitals, since the reference to "permission" in section 23 (1) included permission granted after development had been carried out, and accordingly, albeit permission was granted by the Minister subsequent to the carrying out of the development in question, nevertheless, it was a grant of planning permission within the meaning of the Act.

East Riding County Council v. *Park Estate (Bridlington) Ltd.* [1957] A.C. 223; [1956] 2 All E.R. 669 applied.

(3) That the fact that the owner, on being served with the notice, did not appeal to a court of summary jurisdiction under section 23 (4) did not debar him by reason of section 24 (3) or otherwise from applying to the court for relief; accordingly, the owner was entitled to the declaration sought.

Perrins v. *Perrins* [1951] 2 K.B. 414; [1951] 1 T.L.R. 945; [1951] 1 All E.R. 1075 overruled.

Decision of McNair J. [1957] 2 Q.B. 136; [1957] 1 All E.R. 825 affirmed.

APPEAL from McNair J.

The plaintiff, Kenneth John Roy Francis, who was the owner of premises known as "Riverside," Thorney Mill Road, West Drayton, claimed against the Yiewsley and West Drayton Urban District Council for a declaration that an enforcement notice by the council, under the Town and Country Planning Act, 1947, relating to that land, dated July 23, 1952, was invalid, and that the defendants had no power to serve the notice.

On or about February 1, 1949, the land was developed by placing certain caravans on the land for residential purposes. On March 1, 1949, the plaintiff applied to the defendants, as the local planning authority, for planning permission to use the premises as a caravan site. On May 10, 1949, the defendants refused that permission, and the plaintiff, pursuant to his rights under section 16 of the Act of 1947, appealed to the Minister, and on February 22, 1950, the Minister allowed the appeal, and in notifying the local authority of his decision, stated that he felt no doubt that the decision of the council was justified. "He "notes, however, that there are at present some 16 occupied "caravans on the site, and he is of the opinion that the occupants "of the caravans should be given reasonable time in which to "find alternative sites or accommodation. For this reason "alone, he has decided to allow the appeal to the extent that he "permits the use under appeal for a period of six months from "the date of this letter [February 22, 1950], which is issued by "the Minister as his formal decision."

On July 23, 1952, the defendant authority served on the plaintiff the enforcement notice complained of, which was in these terms: "Whereas you are the owner and/or occupier of "land situate at south of and fronting Thorney Mill Road, West "Drayton, and bounded on the east and south by the River "Colne, and known as 'Riverside.' And whereas on or about "the first day of February 1949 the land above described was "developed by placing thereon caravans for residential purposes. "And whereas such development before-mentioned was carried "out without the grant of planning permission required under "Part III of the Town and Country Planning Act, 1947. Now "therefore the Urban District Council of Yiewsley and West "Drayton on behalf of the County Council of the Administrative "County of Middlesex as Local Planning Authority in exercise "of the powers contained in sections 23 and 24 of the said Act "of 1947 Hereby give you notice to remove all caravans from "the site within fifty-five days of the date on which this notice "takes effect. This notice shall subject to the provisions of "section 23 of the said Act take effect on the expiration of "twenty-eight days after the service thereof upon you. Dated "July 23, 1952."

The plaintiff took no action upon that notice, either by removing the caravans from the site or by appealing against the notice to a court of summary jurisdiction under section 23 (4) of the Act, nor was any move taken by the defendant authority to prosecute the plaintiff under section 24 (3). On December 29, 1955, the plaintiff brought this action asking for the declaration that the enforcement notice was not effective because planning permission as required under Part III of the Act had already been granted for the development, and because the notice did not specify within the meaning of section 23 (2) the development alleged to have been carried out without the grant of planning permission.

McNair J. gave judgment for the plaintiff. The defendant authority appealed.

J. P. Widgery for the local authority. McNair J. held that the enforcement notice sufficiently specified the development complained of, but that the notice was nevertheless invalid, since it was founded on a false factual basis. This appeal raises the questions: (1) Was the factual basis of the notice false? (2) If it was false, what are the legal consequences having regard to the plaintiff's failure to appeal against the notice? As to the first question, it is submitted that McNair J. came to a wrong decision. The statement in the enforcement notice that the development in question was carried out without the permission required by the Act of 1947 was entirely correct. On February 1, 1949, a material change in the use of this land was made and the development complained of took place at that time. Accordingly, since no prior permission had been obtained, the change of user was made without the grant of permission required by the Act. Further, after the expiration of the six months' "reprieve" period, since the Minister's permission was not made retrospective, the authority could rely on the previous development.

By virtue of article 3 of, and class IV (2) of the First Schedule to, the Town and Country Planning General Development Order, 1950 (S.I. 1950, No. 728), the owner of land is entitled to place caravans thereon on not more than 28 days' total in any calendar year. The temporary permission granted by the Minister is to be regarded as an extension of the right of 28 days' user given to every occupier under the General Development Order, 1950. Accordingly, if it be correct, as it is contended, that where an occupier of land uses it as a caravan site for more than 28 days without planning permission in any one year, the planning authority on serving an enforcement notice must therein refer back to the first day of such user; in the present case the authority was entitled so to do despite the Minister's letter of February 22, 1950. The development complained of took place without the grant of permission after the appointed day for the coming into force of the Act of 1947, and, accordingly, the notice complied with the requirements of section 23. For the purposes of section 23 the permission granted by the Minister may be regarded as either (*a*) conditional, (*b*) ultra vires, or (*c*) a direction under the section.

If the facts come within the first limb of section 23 (1) and also within the second limb of the subsection, that does not place a greater burden on the authority to choose one "route" rather than the other. A notice, to be valid, must comply with the following requirements: (*a*) it must specify the activity complained of; (*b*) it must state whether such development was carried out without permission or was a breach of any conditions subject to which permission for the development in question was granted; (c) it must state whether such development was a breach of the 1947 legislation or of planning control under earlier Acts.

Even if it is held that the notice is invalid because it is founded on a false basis of fact, nevertheless the plaintiff cannot succeed in view of the provisions of sections 23 and 24 of the Act. By failing to exercise the right of appeal conferred by section 23 (4) he cannot now complain of the false factual basis of the notice. The time for appeal has expired and accordingly the plaintiff is precluded by section 24 (1) from raising the matter, for it follows that if he had been prosecuted under section 24 (3), not having appealed to the justices, he could not have challenged the notice: *Perrins* v. *Perrins*.[2] [Reference was also made to sections 12, 13, 14, 15, 16 and 18 of the Act, and to *East Riding County Council* v. *Park Estate (Bridlington) Ltd.*[3] and *Norris* v. *Edmonton Corporation*.[4]]

Douglas Frank for the plaintiff. Where the true grounds for serving an enforcement notice are known to the local planning authority at the time of the service of the notice, and the notice alleges other and untrue grounds, it is a nullity ab initio. It is not disputed that at the time when this notice was served the planning authority was no longer concerned with the original development but with seeing that effect was given to the time limit imposed by the Minister. Accordingly, what affected the mind of the authority was that the Minister's decision should be complied with. It did not, therefore, "appear" to the planning authority that development was carried out without permission, and the notice does not comply with section 23 of the Act.

It was said for the local authority that the Minister's permission was one of the following: (a) conditional permission; (b) ultra vires; or (c) it must be deemed to be a direction under section 23. It is suggested that there is a fourth possibility, namely, that since the Minister granted permission and since he has power to grant it only conditionally or unconditionally, then, since no conditions were imposed, it must be deemed to be an unconditional permission. The suggestion that the permission was ultra vires, if accepted, would lead to the extraordinary position that the appeal has not been determined but is still with the Minister! Further, it cannot be a direction under section 23, because the Minister has in terms allowed the appeal.

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[2] [1951] 2 K.B. 414; [1951] 1 T.L.R. 945; [1951] 1 All E.R. 1075.

[3] [1957] A.C. 223, 230, 231; [1956] 2 All E.R. 669.

[4] [1957] 2 Q.B. 564; [1957] 2 All E.R. 801.

It is sufficient for present purposes to regard the Minister's permission as conditional and also the 28 days' user in any year granted by the General Development Order, and indeed that concept is necessary in order to fit in with the terms of section 23. The enforcement notice, to be valid, ought to have referred to the conditional permission granted by the Minister and then stated that the user in question had been continued beyond the 28 day period granted by the General Development Order.

It was contended for the defendants that they had a choice under section 23 (1) as to stating in the notice the grounds of their objection to the development in question. It is submitted that that contention contains an inconsistency: the planning authority cannot be heard to say that the plaintiff broke a "condition" and yet he had no "permission," because if the plaintiff had no permission he could not have broken any condition attached thereto.

The notice is plainly bad, since it does not sufficiently specify the development alleged to have been carried out, or state whether it was in respect of development without permission or was in respect of breach of conditions. By virtue of section 23 (2) any enforcement notice which is served must specify the development which is alleged to have been carried out, but the recitals in this notice do not comply with that provision. It is true that the notice states that "the land above described was developed by "placing thereon caravans for residential purposes," but that is not sufficient, because the plaintiff is not told what *material* changes of user is alleged: see section 12 (2). Further, the mere placing of caravans on land does not amount to a development; it may depend on a variety of matters, including the presence or absence of caravans on the land before the date of the alleged development.

As to the contention that this action was not maintainable owing to the provisions of sections 23 and 24, it is submitted that *Perrins* v. *Perrins* [5] was wrongly decided. In section 24 (1) there is an express prohibition or express bar as to disputing the validity of the notice in the event of failing to appeal, but in section 24 (3) there is no such bar; the maxim expressio unius est exclusio alterius applies. Whatever be the merits for the prohibition contained in section 24 (1) to protect the planning authority, an authority cannot be prejudiced under section 24 (3) by an owner who waits until he has been prosecuted before challenging the

[5] [1951] 2 K.B. 414.

validity of the notice. It is plain from *Norris* v. *Edmonton Corporation*[6] that the Divisional Court doubted the correctness of their decision in *Perrins* v. *Perrins*.[7] [Reference was also made to *East Riding County Council* v. *Park Estate (Bridlington) Ltd.*[8] and *Swallow and Pearson* v. *Middlesex County Council*.[9]]

Widgery replied.

Jenkins L.J. This is an appeal by the defendants, the Yiewsley and West Drayton Urban District Council, from a judgment of McNair J., whereby he granted to the plaintiff a declaration to the effect that an enforcement notice served upon him by the defendants, in pursuance or purported pursuance of the provisions of the Town and Country Planning Act, 1947, was invalid.

Before I refer to the facts, which are not in dispute, it will be convenient to notice some of the provisions of the Act of 1947. Section 12 provides: "(1) Subject to the provisions of this section "and to the following provisions of this Act, permission shall be "required under this Part of this Act in respect of any develop-"ment of land which is carried out after the appointed day. "(2) In this Act, except where the context otherwise requires, "the expression 'development' means the carrying out of "building, engineering, mining or other operations in, on, over "or under land"—then come the material words for the purpose of the present case—"or the making of any material change in "the use of any buildings or other land: . . ."

Section 13 provides: "(1) The Minister shall by order provide "for the grant of permission for the development of land under "this Part of this Act, and such permission may be granted— "(*a*) in the case of any development specified in any such order, "or in the case of development of any class so specified, by "that order itself; . . ."

Section 14 provides: "(1) Subject to the provisions of this "and the next following section, where application is made to "the local planning authority for permission to develop land, "that authority may grant permission either unconditionally or "subject to such conditions as they think fit, or may refuse "permission; and in dealing with any such application the local "planning authority shall have regard to the provisions of the "development plan, so far as material thereto, and to any other

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[6] [1957] 2 Q.B. 564.

[7] [1951] 2 K.B. 414.

[8] [1957] A.C. 223, 237–240.

[9] [1953] 1 W.L.R. 422; [1953] 1 All E.R. 580.

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"material considerations. (2) Without prejudice to the generality "of the foregoing subsection, conditions may be imposed on the "grant of permission to develop land thereunder. . . . (*b*) For "requiring the removal of any buildings or works authorized by "the permission, or the discontinuance of any use of land so "authorized, at the expiration of a specified period, and the "carrying out of any works required for the reinstatement of "land at the expiration of that period; and any permission "granted subject to any such condition as is mentioned in "paragraph (*b*) of this subsection is in this Act referred to as "permission granted for a limited period only."

Section 15 provides: "(1) The Minister may give directions "to any local planning authority, or to local planning authorities "generally, requiring that any application for permission to "develop land, or all such applications of any class specified in "the directions, shall be referred to the Minister instead of being "dealt with by the local planning authority, and any such "application shall be so referred accordingly. (2) Where an "application for permission to develop land is referred to the "Minister under this section, the provisions of subsections (1) "and (2) of the last foregoing section shall apply, subject to any "necessary modifications, in relation to the determination of the "application by the Minister as they apply in relation to the "determination of such an application by the local planning "authority: . . ."

Section 16 contains provisions for appeals to the Minister and provides: "(1) Where application is made under this Part of "this Act to a local planning authority for permission to develop "land, or for any approval of that authority required under a "development order, and that permission or approval is refused "by that authority, or is granted by them subject to conditions, "then if the applicant is aggrieved by their decision he may by "notice served within the time, not being less than twenty-eight "days from the receipt of notification of their decision, and in "the manner prescribed by the development order, appeal to the "Minister: . . . (2) Where an appeal is brought under this "section from a decision of the local planning authority the "Minister may allow or dismiss the appeal or may reverse or "vary any part of the decision of the local planning authority, "whether or not the appeal relates to that part, and deal with "the application as if it had been made to him in the first "instance; and the provisions of the last foregoing section shall "apply, subject to any necessary modifications, in relation to "the determination of an application by the Minister on appeal "under this section as they apply in relation to the determination by the Minister of an application referred to him under "that section."

I should also refer to section 18, which provides: "(1) The "power to grant permission to develop land under this Part of "this Act shall include power to grant permission for the retention on land of any buildings or works constructed or carried "out thereon before the date of the application, or for the "continuance of any use of land instituted before that date "(whether without permission granted under this Part of this "Act or in accordance with permission so granted for a limited "period only); and references in this Part of this Act to permission to develop land or to carry out any development of land, "and to applications for such permission, shall be construed "accordingly. (2) Any such permission as is mentioned in the "foregoing subsection may be granted so as to take effect from "the date on which the buildings or works were constructed or "carried out, or the use was instituted, or from the expiration "of the said period, as the case may be."

I can next go to section 23, which deals with the enforcement of planning control, and contains the provisions as to enforcement notices with which we are immediately concerned. [His Lordship referred to sections 23 and 24 and continued:] I should note that under the Town and Country Planning General Development Order, 1950, under article 3 permission is in effect granted under the provisions of section 13 of the Act, to certain types of development specified in the First Schedule to the Order; and if one looks to the First Schedule to the Order one finds that one of these excepted types of development is thus stated in class IV (2): "The use of land (other than a building or the "curtilage of a building or the site or curtilage of a building "which has been demolished in consequence of war damage) for "any purpose on not more than twenty-eight days in total in any "calendar year, and the erection or placing of movable structures "on the land for the purposes of that use."

[His Lordship stated the facts and continued:] The importance of the matter to the defendants is that, as will have been observed, under section 23 (1) of the Act the right of a local planning authority to serve an enforcement notice is limited to the period of four years from the date of the relevant development. If, therefore, the notice served on July 23, 1952, is held invalid, the result to the defendants will be that they will be out

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of time, the four-year period having passed, and so will not be able to regularize the matter by the simple expedient of starting again with a fresh enforcement notice.

The points taken before the judge and argued in this court are substantially these. First, it is said that the notice was bad because it did not sufficiently specify the development alleged to have been carried out, or say whether it was in respect of development without permission, or was in respect of breach of conditions. In presenting that argument before us, Mr. Frank concentrated on the objection that the development was not sufficiently specified. He pointed out that any enforcement notice served must by section 23 (2) specify the development which is alleged to have been carried out; and he said that this requirement is not sufficiently complied with by the recitals in the enforcement notice in the present case: "Whereas on or "about the first day of February 1949 the land above described "was developed by placing thereon caravans for residential "purposes. And whereas such development before-mentioned "was carried out without the grant of planning permission "required under Part III of the Town and Country Planning "Act, 1947."

Mr. Frank contends that notwithstanding the express reference to the placing on the land of caravans for residential purposes, even though that is described in terms as a development—the allegation being that "the land above described was developed "by placing thereon caravans for residential purposes"—nevertheless the development is not sufficiently specified because the owner of the land is not told what material changes of user is alleged. He says, further, that the mere placing of caravans on land does not amount to a development; it may depend on a variety of matters, including the presence or absence of caravans on the land before the date of the alleged development.

I cannot accept this branch of Mr. Frank's argument. It is no doubt true that notices which may have penal results, and which are served pursuant to legislation which has the effect of curtailing ordinary proprietary rights, should be strictly construed, and the court should be careful to see that they are adequate documents having regard to the terms of the legislation. But to my mind this criticism of the present notice goes too far. It seems to me to be reasonably plain that it tells the owner that something has happened on his land which the defendants allege to be a development, namely, the placing thereon of caravans for residential purposes. I think that by including in their notice recitals to that effect the defendants sufficiently complied with the requirement in section 23 (2) that the notice should specify the development. Accordingly I reject that ground.

The second ground, which was the one on which the judge decided in the plaintiff's favour—having, as I have done, rejected the first argument—affords to my mind a far more formidable objection. At the date of the enforcement notice the position was this. The development had taken place in February, 1949. No prior permission had been obtained; but, on the other hand, for the first 28 days of this user no permission was required over and above the permission given by the General Development Regulations, to the relevant provisions of which I have already referred. From the expiration of that period of 28 days there was no further permission in respect of the development until the Minister's decision; and the Minister had, by his decision on February 22, 1950, allowed the plaintiff's appeal to the extent that he permitted the use under appeal for a period of six months from the date of his letter; and the period of six months during which that permission endured had expired on August 22, 1950. Those were the surrounding circumstances in the light of which the validity of this notice must be considered.

I return again to section 23: "(1) If it appears to the local "planning authority that any development of land has been "carried out after the appointed day without the grant of permission required in that behalf under this Part of this Act, or "that any conditions subject to which such permission was "granted in respect of any development have not been complied "with," then the notice may be served within four years. In the circumstances that I have stated, could it appear to the defendants that the development in the present case had been carried out after the appointed day without the grant of permission required in that behalf under the Act? Mr. Widgery says that this question should be answered in the affirmative, and as I understand it, he puts his argument thus: He says that this placing of caravans on the land was a development carried out after the appointed day. He says, moreover, that it was carried out without the grant of permission required under the Act, inasmuch as no prior permission was obtained. Therefore the enforcement notice was perfectly right in reciting that the development in question was carried out without the grant of planning permission; and the defendants could properly so state in their notice, thus complying with section 23 (1). So Mr. Widgery in that way arrives at the conclusion that the notice

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is good, and complies with the terms of the section, when considered in the light of the facts, simply as a notice dealing with a case in which there has been a development in respect of which no permission at all has been given.

As to the Minister's direction, Mr. Widgery, in effect, said that the permission granted by the Minister (granted, as it was, only for the limited period of six months) was spent long before this notice was served. It was thus no longer relevant, and could be disregarded, though no doubt it would have been open to the defendants, if so minded, to frame the notice as given in respect of a breach of a condition imposed by the Minister's permission to the effect that the use was to be discontinued at the end of the six months from February 22, 1950. I cannot accept this argument.

Mr. Frank puts the matter in this way, and he complicates it somewhat by the introduction of the permission under the General Development Order, 1950, in respect of 28 days in any calendar year for certain types of development, such as the caravans in this case. He says that it is wholly wrong and untrue to say that the development here in question was carried out after the appointed day without the grant of permission. He says that there was permission in two respects, or at two stages: First, he says there was the statutory permission to use the land for such purposes for 28 days. Secondly, when that 28 days ran out, albeit there was an interval when there was no permission in force, permission was ultimately granted by the Minister to continue the user for six months from February 22, 1950, so that there had in fact been permission, and to state otherwise was to state an untruth.

I do not propose to examine the mysteries of the General Development Order, or the precise quality of the 28 days in any calendar year for which user is allowed without permission other than the permission granted by the order itself. I am content to deal with the matter simply by reference to the permission granted by the Minister. The words of section 23 (1) refer to the grant of permission required in that behalf under the Act; and, in my judgment, that reference to permission must include (as indeed section 18 indicates) permission given after the development has been carried out; and if one construes the reference to permission in section 23 (1) in that way, it is clear that it could not be said of this development that it was carried out after the appointed day without the grant of permission.

Permission was granted, albeit not prior permission, but permission subsequent to the carrying out of the development. That being, however, in the view I take, permission within the meaning of the Act, it necessarily follows that there is a misstatement in the recitals of the enforcement notice.

That, I think, is all I need say on this second point. It is a very short one when reached, although the reaching of it involves consideration of several sections of the Act. It follows from what I have said that, in my view, the notice proceeded (as the judge said in effect) on a wholly false basis of fact; and inasmuch as it proceeded on a wholly false basis and, so to speak, charged the plaintiff with an offence other than the offence he had actually committed, in my view it cannot stand. An owner of land whose rights are to be affected by the service of a notice of this sort is, in my opinion, entitled to a proper notice setting out the real grounds of the complaint or claim against him, whatever it may be. I think that view is borne out by the speeches in the House of Lords in *East Riding County Council* v. *Park Estate (Bridlington) Ltd.*[1]

Finally, the point was taken that, however strong the plaintiff's case might be on the merits, this action could not be maintained owing to the provisions of sections 23 and 24 of the Act. It will be remembered that subsection (3) of section 23 provides: "Subject to the provisions of the next following sub-"section, an enforcement notice shall take effect at the expiration "of such period (not being less than twenty-eight days after the "service thereof) as may be specified therein." It will further be remembered that there was no appeal by the plaintiff against the enforcement notice in exercise of the right of appeal conferred by subsection (4) of section 23.

It was said that the plaintiff, having failed to avail himself of his right of appeal, could not now litigate the matter before the judge or in this court. The time for appeal having run out, the provision in the Act that the enforcement notice shall take effect, according to this view, concludes the matter. That is a view which I cannot accept. Whatever the result might be of an unqualified provision that after a certain time an enforcement notice should take effect, here one has in section 24 (1) an express provision limiting to a qualified extent the right of the party aggrieved to litigate the matter. That limitation is expressed in these words: "and if that person, having been entitled to "appeal to the court under the last foregoing section, failed

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[1] [1957] A.C. 223; [1956] 2 All E.R. 669.

"to make such an appeal, he shall not be entitled in proceedings "under this subsection to dispute the validity of the action taken "by the local planning authority upon any ground which could "have been raised by such an appeal." That is quite inconsistent with any general bar, and it should be noted that it is limited to "proceedings under this subsection." "This sub-"section," namely, section 24 (1), deals with development other than development by material change in user, and it contains provisions under which the local planning authority may enter on the land, and in effect take the necessary steps to put an end to the development in question, and, having taken those steps, may recover as a simple contract debt in any court of competent jurisdiction from the person who is then the owner of the land any expenses reasonably incurred by them in that behalf. But the relevant provision in this case is not section 24 (1), but section 24 (3). That provides for the prosecution and punishment by fine of persons who fail to carry out an enforcement notice in cases in which, by virtue of an enforcement notice, any use of land is required to be discontinued. That subsection contains no limitation at all on the arguments that the person prosecuted can put forward, whether or not they are arguments which he might have taken on an appeal. In these circumstances, I cannot accept the view that the plaintiff is barred from the remedy that he seeks by way of declaration.

I appreciate that that view is in conflict with the decision in *Perrins* v. *Perrins*.[2] In that case (which was also a case of change of user) the defendants, who had been served with an enforcement notice requiring them to discontinue the use of the land in question as a camping site, took none of the steps required in the notice, and lodged no appeal against it. "They were "charged under section 24 (3) of the Act with using the land in "contravention of the notice. The justices acquitted them of "that offence on the ground that the land in question had been "used as a camping site before and on the appointed day and "that the prosecutor had therefore not proved that there had "been any development as alleged in the notice. On the prose-"cutor's appeal:—*Held*, that, whether the planning authority "were right or wrong in the view which they took of the "development of the land, the effect of section 23 (3) of the Act "of 1947 was that an enforcement notice which was not appealed "within 28 days became effective, and that the justices could "not then question its validity."

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[2] [1951] 2 K.B. 414; [1951] 1 T.L.R. 945; [1951] 1 All E.R. 1075.

Having regard to the views that I have endeavoured to express as to the construction of sections 23 and 24 of the Act, I cannot agree with that conclusion. The judge found it possible, while accepting the decision in *Perrins* v. *Perrins* [3]— a case which, of course, was binding on him—to reach the same conclusion as I have with respect to the admissibility of the present claim for a declaration. I say nothing further about that aspect of his judgment because it seems to me that the simple answer is that *Perrins* v. *Perrins* [4] was wrongly decided.

I have now, I think, dealt with the essential points in the case, and for the reasons I have endeavoured to state I hold that this appeal fails, and should be dismissed.

PARKER L.J. I have come to the same conclusion, and I will add only a few words in deference to Mr. Widgery's argument on what I may call the second point, namely, as to the factual basis of the enforcement notice. Under section 23 (1) it is clear that there are two alternative conditions precedent to the service of an enforcement notice. It must either appear "to the local "planning authority that any development of land has been "carried out after the appointed day without the grant of per-"mission required in that behalf under this Part of this Act," or it must appear to the local planning authority "that any "conditions subject to which such permission was granted in "respect of any development have not been complied with."

Here it is to my mind clear that there has been a breach of condition. The Minister by his decision of February 22, 1950, has permitted the user of this land as a caravan site for a period of six months. It is said (and said with some force) that no express condition is therein set out that at the end of the six months' period the caravans are to be removed. But as I read it, such a condition must be implied. For one reason, it seems to me that the Minister had otherwise no power to give any such permission. Under the relevant section (section 16) which gives the Minister his powers on appeal, his powers are those which he would have had under section 15 if he had, as it were, called in the case and dealt with it himself from the beginning; and his powers under section 15 carry one back to section 14, and set out the powers of the local planning authority, which are either to grant the permission, or to refuse the permission, or to grant permission subject to condition. Those were the only powers of the Minister.

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[3] [1951] 2 K.B. 414.

[4] Ibid.

Indeed, as I understand it, Mr. Widgery is really forced to concede that this decision of the Minister should properly be regarded as a conditional permission. He did suggest that it might be read as a direction under section 23, which empowers the Minister to give directions to a local planning authority not to serve a notice. But, as is pointed out, if that were the object and intention, the Minister could not have allowed the appeal. Mr. Widgery, accordingly, is forced to say that in this case he had a choice as to which of the conditions precedent to which I have referred he should allege. He says that he could have proceeded under either. I must say that at first sight that is a surprising conclusion if it were true, because it seems impossible to allege that a person has broken a condition, and at the same time be able to say that no permission was ever granted. But, in my view, the answer is, that on the facts of this case the defendants cannot bring themselves within the first condition precedent, which is the only condition they have alleged. As my Lord has said, the words "without the grant of permission "required in that behalf" must be read as including permissions whether given before or after the development in question; and that is made clear by section 18, to which he has referred, which specifically includes a power in the Minister to make a decision retrospective. Accordingly, in my view, the factual basis that has been referred to in this notice is false.

I should add that I desire to make no comments as to the so-called permission given by the development order itself, for user on 28 days, and as to the effect of that permission.

Lastly, in regard to *Perrins* v. *Perrins*,[5] like my Lord, I feel constrained to say that that case was wrongly decided; and I am less diffident in doing so seeing that another Divisional Court in *Norris* v. *Edmonton Corporation*[6] clearly had in mind some doubt. Lord Goddard C.J. himself—who, of course, had sat in the first court—said[7]: "I think as this is a criminal cause or "matter, as the appellant is being summoned on an information "and dealt with for a default, it is a great misfortune that this "case cannot go to the House of Lords. There are still obscure "questions under this section, and now that I have called "attention prominently to *Keats'* case,[8] it is very desirable that "an opportunity should be given to their Lordships to consider "that case. Unfortunately, the law does not allow an appeal

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[5] [1951] 2 K.B. 414.

[6] [1957] 2 Q.B. 564; [1957] 2 All E.R. 801.

[7] [1957] 2 Q.B. 564, 571.

[8] [1954] 1 W.L.R. 1357; [1954] 3 All E.R. 303.

"from this court in a criminal cause or matter, but I hope that "possibly some opportunity may be taken to try to clear up by "legislation the obscure position which arises under this Act."

Slade J. said [9]: "I respectfully agree with what my Lord "has said, namely, that this court is bound by its decision in "*Perrins* v. *Perrins*.[10] Had the matter been res integra I "should have required to hear argument on the true construction "of section 24 (1) and (3)," and the judge went on to refer to section 24 (1), where the bar is expressed as one in proceedings "under this subsection."

For the rest, I entirely agree with what my Lord has said, and for these reasons I would dismiss this appeal.

PEARCE L.J. I agree with what my Lords have said. I would only add this in regard to section 24 since we are differing from the view expressed in *Perrins* v. *Perrins*.[11] The insertion of the words in question in subsection (1) of section 24 and their omission from subsection (3) indicate, in my opinion, a deliberate intention to create a difference in that respect between the two subsections. Further, those words are suitable in subsection (1), but are not apt for transplantation into subsection (3). Moreover, I think that the probabilities endorse this view. It would seem reasonable to create an estoppel in cases where the authority has done work on the basis of the unchallenged validity of the notice, and is seeking to recover the costs as a debt. In such a case the court hearing comes at a stage that is inconveniently late for questioning the validity of the notice. But in cases where the authority are prosecuting an owner or occupier for continuing some unpermitted use, there seems less necessity for preventing an investigation of the question whether the notice was a good one; and it may well have been thought undesirable to deprive a defendant of what might be a valid defence against conviction.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co. for A. Boote, West Drayton; Speechly, Mumford & Craig for Woodbridge & Sons, Uxbridge.*

J. A. G.

[9] [1957] 2 Q.B. 564, 572.
[10] [1951] 2 K.B. 414.
[11] Ibid.

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[1955 K. No. 1272.]

Alien—Landing or embarkation—Airport—Alien landing from aircraft at approved port for purpose only of embarking in another aircraft—Power of immigration officers to restrict limits or premises within which alien required to remain—Aliens Restriction Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 12), *s.* 1—*Aliens Restriction (Amendment) Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 92), *s.* 1 (1)—*Aliens Order,* 1953 (*S.I.* 1953, *No.* 1671), *art.* 2 (1) (*b*), (2).

By article 1 of the Aliens Order, 1953,[1] an alien shall not land from an aircraft in the United Kingdom except with the leave of an immigration officer, but by article 2 (1) (*b*) leave to land shall not be required "in the case of an alien who lands from an aircraft "at an approved port for the purpose only of embarking in an "aircraft at the same port, and remains, throughout the period "between his landing and embarkation, within such premises or "limits as may be approved for the purpose by an immigration "officer."

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[1] Aliens Order, 1953, art. 1: "(1) Subject to the provisions of this "Order, an alien shall not land or "embark in the United Kingdom "except with the leave of an immi-"gration officer, and shall not so "land or embark elsewhere than at "an approved port or at such other "place as an immigration officer may "in any particular case allow."

Art. 2: "(1) Subject to para-"graph (2) of this article, leave to "land shall not be required under "article 1 of this Order—. . . . "(*b*) in the case of an alien who "lands from an aircraft at an "approved port for the purpose only "of embarking in an aircraft at the "same port, and remains, through-"out the period between his landing "and embarkation, within such pre-"mises or limits as may be "approved for the purpose by an "immigration officer.

"(2) Notwithstanding anything in "paragraph (1) of this article, an "immigration officer may at any time ". . . (*b*) grant or refuse leave to "land to an alien who is within the "United Kingdom after landing "without leave thereunder; and "thereupon . . . paragraph (1) shall "cease to apply to the alien."

Art. 7: "(2) . . . an immigration "officer may examine any person "seeking to land or embark in the "United Kingdom for the purpose of "ascertaining whether that person is "or is not an alien and, in the case "of an alien, for the purpose of "determining whether leave to land "or embark should be granted to "him under this Order; and it shall "be the duty of every such person to "furnish to an immigration officer "such information as that officer "may require for the purpose of his "functions under this paragraph.

"(3) Notwithstanding anything in "article 1 of this Order, an alien "may land, without the previous "grant of leave to land, for the pur-"pose of examination under this "article in accordance with arrange-"ments in that behalf approved by "an immigration officer, and if he "submits himself forthwith to such "examination shall be deemed for "the purposes of this Order not to "have landed unless and until such "leave is granted to him; and an "alien who lands as aforesaid may "be detained, pending and during the "examination, under the authority of "an immigration officer."

Art. 8: "(1) Where leave to land "is refused to an alien, an immi-"gration officer may . . . give direc-"tions—(*a*) to the . . . commander "of the aircraft in which the alien "arrived in the United Kingdom, "requiring him to remove the alien "from the United Kingdom in that ". . . aircraft; . . .

"(4) An alien to whom leave to "land is refused may be detained, "under the authority of an immigra-"tion officer, pending the giving of "directions in his case under para-"graph (1) of this article and pend-"ing his removal in pursuance of "directions so given; . . ."

At 6 p.m. on a day in April, 1955, the plaintiff, a German national resident in the Republic of Ireland, who held a through ticket from Amsterdam to Dublin, landed from an aircraft at London Airport (an approved port for the purposes of the Aliens Order, 1953) for the purpose only of transferring to another aircraft in which he intended to fly on to Dublin. That aircraft was scheduled to leave London Airport at 8.40 p.m. on the same day, but its departure point was some distance away from the place where the plaintiff had landed, access thereto being along a road which, though within the confines of the airport, was virtually a public road. At the material time the immigration authorities had instructions that the plaintiff was to be prohibited from landing in the United Kingdom. They did not in fact refuse him permission to land, but caused inquiries to be made about him, detaining him meanwhile in the immigration hall adjacent to the place where he had landed and from which it was impossible for him to embark on the aircraft for Dublin. Authority for him to cross the airport to the departure point for the Dublin aircraft was not obtained by the immigration officers until two and a half hours later, by which time it was too late for him to board the aircraft, which left without him. The plaintiff spent the night at the airport, there being no other aircraft for Dublin until early the following morning.

In an action for damages for false imprisonment against the Home Office and the senior immigration officer at the airport, the plaintiff alleged that he had been wrongfully detained from the time that he landed until he left the following morning, and that his liberty had been restricted:—

Held, that the immigration authorities were not entitled to exercise the discretion conferred on them by article 2 (1) (*b*) of the Order to limit the premises or limits within which an alien landing lawfully for the sole purpose of embarking in another aircraft might remain during the period between his landing and subsequent embarkation in such a way as to render his embarkation in the other aircraft impossible, since so to act would be to frustrate the purpose for which article 2 (1) (*b*) was included in the Order; accordingly, as the immigration officers had restricted his liberty to a greater degree than they were entitled to do under article 2 (1) (*b*), the plaintiff was entitled to regard that restriction as false imprisonment and was entitled to damages.

Semble that the immigration authorities were entitled to a reasonable time in which to decide whether to refuse an alien leave to land under article 2 (2) of the Order.

ACTION.

The following statement of facts is summarized from the judgment.

The plaintiff, Carl Walther Kuchenmeister, was a German national who, after being interned for some years in England, had been required to leave the country in 1948, and since that date had not been allowed to reside in or visit the United Kingdom. In April, 1955, he was resident in Dublin, where he had lived since 1948, and where he carried on business. On April 27, 1955, the plaintiff, who three days previously had flown from Dublin on a direct flight to Amsterdam, boarded an aircraft at Amsterdam to return to Dublin. Although he had a through ticket to Dublin he was informed that the aircraft on which he would be travelling went no further than London, so that he would have to transfer at London Airport to an aircraft operated by Aer Lingus in order to complete his journey to Dublin. At the time the plaintiff was a person to whom the immigration authorities in the United Kingdom were instructed to refuse leave to land, but he had undertaken previously many journeys to the Continent via Manchester without encountering any difficulties with the immigration authorities, as the normal procedure was for passengers on a transit journey involving a call at the airport not to be subjected to any examination by the immigration authorities, but to be kept segregated while awaiting re-embarkation, rejoining the aircraft when it was ready to continue its journey. In those circumstances, the operating company certified that all transit passengers who had disembarked had in fact re-embarked.

On April 27, 1955, Aer Lingus aircraft were using a new section of London Airport, namely, the central section, which had only recently come into operation, whereas K.L.M., who operated the aircraft in which the plaintiff travelled from Amsterdam to London, used the north section of the airport, some distance from the central section. Access between the two sections was by means of a road a mile long which ran across the airport but within its perimeter. The north section was close to a main road and there was nothing to prevent anyone who wished from walking out of the airport onto the road, thereby obtaining access to any part of the country. In order to board the Aer Lingus aircraft and to continue his journey to Dublin the plaintiff had to go to the central section and in consequence travel along the road linking the two sections.

Having disembarked from the aircraft from Amsterdam soon after 6 p.m. on April 27, 1955, the plaintiff was escorted, with other passengers, to the immigration hall where he presented his passport and certificate of registration under the Aliens Order, 1920, to an immigration officer. He stated that he was going direct to Dublin and had been told that he needed no landing card. He was, however, requested to fill one in and he did so, stating therein that he was "in direct transit to Dublin only." On presenting the card to the immigration officer that officer referred to a small book and after consulting the senior immigration officer, on his instructions, told the plaintiff to wait in a corner of the immigration hall. The plaintiff did so, and although from time to time he protested, stating that he had no intention or desire to enter the United Kingdom, and that he was in transit only, he was in fact kept waiting in the immigration hall until approximately 8.20 p.m., when he was told by one of the immigration officers that he would be escorted to the aircraft for Dublin which was due to leave at 8.40 p.m. At 8 o'clock the plaintiff had reminded the immigration officers that he had to report to the aircraft departure point 40 minutes before it was due to leave. At 8.20 p.m. the plaintiff was driven over to the central section passenger buildings, but although every effort was then made by the immigration officers to obtain permission for him to board the aircraft it proved to be impossible owing to a rule of the operating company then in force that the passenger list should be closed half-an-hour before the departure time of the aircraft. As a result, the aircraft left without the plaintiff, who spent the night in the transit lounge at the airport. In the morning he was conducted to an aircraft which left for Dublin at 7.45 a.m., his passport and registration certificate being returned to him when he went aboard.

It appeared from the evidence of the immigration officers that during the time that the plaintiff was kept waiting in the immigration hall inquiries were being made to decide the course which ought to be taken in view of the existing instructions that the plaintiff should not be given leave to land, and the fact that, in order to embark on the aircraft for Dublin, he would have to travel from the north to the central section of the airport and thus travel along the road through the airport which was virtually a public road. It was not until after a telephone call had been made to Dublin and an assurance received from an official of the Department of Justice in the Republic of Ireland that the plaintiff would be allowed to land in Dublin that the senior immigration officer telephoned his superior at the Home Office for

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permission for the plaintiff to proceed across the airport to the central section. That permission was only given at 8.20 p.m. when it was immediately acted upon.

In this action the plaintiff claimed damages for false imprisonment against the Home Office and the senior immigration officer at the airport. He claimed that on April 27, 1955, he was lawfully travelling by air from Hanover to Dublin via Amsterdam and London, and that on landing at London Airport in the course of that journey he was wrongfully imprisoned by being detained by the senior immigration officer and others employed in the immigration office from 6 p.m. on April 27, 1955, until 7 a.m. the following morning in the immigration office and a lounge at the airport; that he had been deprived of his liberty; missed his connexion from London Airport to Dublin and suffered humiliation, discomfort and inconvenience.

The defendants contended that as the plaintiff was an alien, by reason of article 1 (1) of the Aliens Order, 1953, he was not entitled, nor at liberty, to land in the United Kingdom except with the leave of an immigration officer; that he was not entitled to proceed from the north to the central section of the airport which involved travel along a road open to the public without the leave of an immigration officer; that no leave to land was given. Alternatively, they contended that permission was given at approximately 8.15 or 8.20 p.m. by the senior immigration officer, who thereupon made all reasonable efforts to secure the plaintiff's departure by the intended aircraft, but that the plaintiff was prevented from so departing by circumstances not reasonably foreseeable by or within the control of the defendants. They denied each and every allegation of wrongful imprisonment or detention and relied on articles 7 (2) and (3) and 8 (4) of the Order of 1953 as justifying any detention complained of. They denied that the plaintiff had been deprived of any liberty to which he was in law entitled.

L. G. Scarman Q.C. and *W. A. L. Forbes* for the plaintiff.

Sir Harry Hylton-Foster Q.C., S.-G., and *Rodger Winn* for the defendants. The second defendant took the view, rightly or wrongly, that the plaintiff was an alien who required leave to land by virtue of article 1 (1) of the Aliens Order, 1953. If that view was right, nothing was done which was not justified in the course of an examination for the purpose of seeing whether leave to land should or should not be given. The second defendant in no way exceeded his powers under article 7 (3). The plaintiff's case must rest on the proposition that he came within article 2 (1) (*b*) of the Order, but it is submitted that the second defendant correctly took the view that he did not do so. The regulations as to landing apply generally to all the airports in the United Kingdom, in some of which, such as Manchester, there is only one "controlled area," whereas at the material time at London Airport there were two, one at the north section and one at the central section, but there were no limits in between. If an alien to whom leave to land must be refused can be permitted to go outside the physical or notional limits set by the immigration officers within those two sections, the whole basis of the system of control at the airport would break down.

The construction given to article 2 (1) (*b*) should not, if it can properly be avoided, produce the result that the immigration authorities are bound to approve ad hoc limits to suit a particular case. It is to be observed that, notwithstanding the provisions of article 2 (1) (*b*), article 2 (2) gives the immigration authorities an overriding power to refuse an alien leave to land. Even if the plaintiff establishes that article 2 (1) (*b*) did apply to him, the only wrong would lie in depriving him of some liberty to which he was entitled thereunder. But that article does not confer upon an alien an absolute liberty to go where he pleases. It merely cuts down the restrictions the Order otherwise imposes on him and confers a liberty on him to remain within the premises or limits which are approved. As to the alleged detention, at the material time, having regard to the approved limits at London Airport, in so far as the plaintiff could be said to have been detained, it was an entirely legal operation because he was merely being prevented from going outside the approved limits. So far from there being a vindictive frustrating of the plaintiff's desire to leave after missing his plane, the second defendant did all he could to assist him to get away.

Rodger Winn following. It is common ground that article 1 (1) of the Order prohibited the plaintiff from landing without leave unless he came within some exempting provision in the Order. He claimed to have landed lawfully under the terms of article 2 (1) (*b*), but even so it was necessary to determine whether he did or not. If he did, the question arises, what were his rights under article 2 (1) (*b*)? Had he, as an alien, desired to land at one airport in the United Kingdom and depart from another in a different part of the country he would have had no right to do so without the leave of the immigration authorities. It is only because London Airport is one airport, albeit with separate sections, that there can be anything in this case at all. It is true that article 2 (1) (*b*) modifies the meaning of the word "land" in article 1 (2), but it cannot mean that the plaintiff was at liberty to go from the passenger landing buildings in the north to the departure buildings in the central section and to say that while so doing he had not landed. Under article 2 (1) (*b*) an alien must conform to any directions which the immigration authorities give him and he must remain within the limits fixed by them. The nullity of the plaintiff's case is manifested by the fact that under article 2 (2) at any time, even assuming that the plaintiff had stepped out of the aeroplane, relying on article 2 (1) (*b*) to protect him from any adverse process, the immigration authorities were entitled to refuse him leave to land.

[Barry J. Your argument rests on the basis that under article 2 (1) (*b*) an alien has no right to go beyond the limits approved by the immigration authorities and there is no need for them to publish the limits. They might be entitled not to approve any limits at all. The question is, in those circumstances, how long can an alien who does not wish to remain in this country be kept here?]

In the case of a British citizen kept waiting at an airport by the immigration authorities, no action for false imprisonment would lie in the absence of malice. In the case of an alien who has no rights, there would be no actionable wrong. It is true that he may be freed by article 2 (1) (*b*) from the prohibition against landing, but by the terms of that article he can lawfully do nothing but get out of the aircraft and stay within the prescribed limits. If he does not wish to do so he must abandon his intention of staying in this country. He can at any time go away without having trespassed outside the prescribed limits. That is the purely legal position. If he asks permission to go outside the limits because, for example, he is cold or uncomfortable, and that permission is refused, the question might arise whether the refusal was reasonable, but that would merely be a matter of complaint. If he was told by the immigration authorities to stay in one chair and not move, that would be depriving him of his liberty. As to the importance of control over the movement of aliens on landing, the argument of the Solicitor-General is adopted.

Scarman Q.C. in reply. The second defendant made a basic mistake in handling the plaintiff's case. He treated him as though he was an alien seeking leave to enter this country, whereas in fact, as the plaintiff made plain from his very first contact with any of the immigration officers, he was no such person. Overruling and disregarding his protests, the second defendant then put into action the machinery of examination and inquiry provided by article 7 (2) and (3), which would have been legitimate if the plaintiff had in fact been seeking to enter this country but which was not appropriate in the present case. The question is: was the second defendant, in the circumstances of that evening, entitled to treat the plaintiff as a man who needed leave to land? No such leave was required because the plaintiff was an alien who complied with the description and requirements of article 2 (1) (*b*) and as such was entitled to the liberty conferred by it. He was in fact an alien who had landed from an aircraft at an approved port for the purpose only of embarking in another aircraft at the same port. Having landed and being prima facie in a position to claim the protection of article 2 (1) (*b*), it was the duty of the immigration officers either to grant or refuse him leave to land (as they were entitled to do under article 2 (2)) or to approve limits within which he could achieve the purpose for which alone he had landed. It might be that they were entitled to a reasonable time within which to decide whether or not to invoke article 2 (2), but on the facts and in view of the plaintiff's assertion that he wished only to embark on the aeroplane to Dublin, confirmed by his ticket and passport, the inquiries to Dublin and London which were in fact put in train were unnecessary and unreasonable.

It would make nonsense of article 2 (1) (*b*) and constitute a trap for the unwary alien if its provisions could be disregarded and the liberty afforded by it lost upon the secret and arbitrary exercise of an immigration officer's discretion. That is what the argument for the defendants amounts to. It must be conceded that the plaintiff came within article 2 (1) (*b*). The object of that article is to enable aliens in transit through this country to pass through without let or hindrance. Admittedly that must be controlled, but it is controlled by the provision for the approval of limits within which the alien must remain, and further by article 2 (2), which allows the immigration authorities by refusing leave to land at any time to remove the alien's liberty of passage within those limits. But if action is taken under article 2 (2) it is essential that the decision should be communicated to the alien concerned. Here no such communication was ever made and therefore the plaintiff was entitled to the liberty conferred on him by article 2 (1) (*b*), because it was never taken away from

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him. To put any other construction on the words of the article would strain their meaning, and that should not be done merely for the purpose of confining the liberty of the subject: see *Liversidge* v. *Anderson*, *per* Lord Atkin.[2] The discretion conferred on the immigration officers under article 2 (1) (*b*) relates to the geographical situation of the premises in which the alien may be.

If the construction put forward by the plaintiff is the correct one, he was entitled to the liberty of proceeding to the aircraft for Dublin and embarking in it. Any action which deprives him of that liberty against his will is a trespass to the person and a false imprisonment. If it be necessary, it is submitted that, as an alien to whom article 2 (1) (*b*) applies, the plaintiff is an alien who has landed in this country with the consent of the Queen. For the rights of an alien friend landed in this country, see *Johnstone* v. *Pedlar*,[3] *per* Lord Findlay[4] and *per* Lord Sumner.[5] As such he has the rights of person and property of a British subject, subject only to any restrictions imposed by statute law and, in the instant case, by the Aliens Order, 1953. If he complies therewith and if, notwithstanding that compliance, he is restrained against his will from doing what he is at liberty to do, that is false imprisonment. In a case of this sort, where the liberty of the subject is involved, there is a presumption that the imprisonment is unlawful until it is shown to be justified: see the judgment of Lord Atkin in *Liversidge* v. *Anderson*,[6] which, although a dissenting one, represents the law of England. [Reference was also made to *John Lewis & Co. Ltd.* v. *Tims*.[7]]

As to the detention, there is no justification alleged in the defence other than the powers given to the immigration authorities by articles 7 (3) and 8 (4) of the Order. Admittedly those two articles contain express powers of detention, but article 7 (3) is inapplicable in the case of an alien landing under article 2 (1) (*b*), and the defendants no longer rely on article 8 (4). It would be remarkable, when such express powers of detention are contained in the Order, if a secret power of detention were contained in article 2 (1) (*b*). In those circumstances it is submitted that this imprisonment has not been justified and that the plaintiff is entitled to succeed.

Rodger Winn. The question whether there was in the plaintiff an absolute and unqualified right to proceed to the central section and a correlative obligation on the immigration authorities to provide him with an approved limit within which he could so proceed depends on the meaning to be given to the words "premises or limits as may be approved" in article 2 (1) (*b*), that is to say, whether the word "may" as there used is to be regarded as mandatory. It is submitted that it is not so used. [Reference was made to Maxwell on the Interpretation of Statutes, 8th ed., p. 210, and to *In re Baker*.[8]] It is essential that a discretion should remain in the immigration authorities responsible for seeing that an alien who has landed relying on article 2 (1) (*b*) does not rely upon it to evade control. No meaning should be given to the words of that article incompatible with its purpose, which is to ensure that control can be maintained. Moreover, that the power to fix limits is discretionary and not mandatory is demonstrated by the inclusion of article 2 (2), under which the alien can at any time be prevented from exercising his purported right under article 2 (1) (*b*). The plaintiff's further submission that the limits not only must be approved but must be approved promptly without any unreasonable delay so as not to impede the progress of the alien cannot be sustained, because even if the obligation to approve limits were mandatory it would still fall far short of imposing on the immigration authorities an obligation to approve the limits within a short time, or such time as the court might think reasonable, without knowing the circumstances of the particular case, or within such time as the alien himself thought reasonable. The action should fail.

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[2] [1942] A.C. 206, 244; 58 T.L.R. 35; [1941] 3 All E.R. 338.

[3] [1921] 2 A.C. 262; 37 T.L.R. 870.

[4] [1921] 2 A.C. 262, 272.

[5] Ibid. 292.

[6] [1942] A.C. 206, 245.

[7] [1952] A.C. 676; [1952] 1 T.L.R. 1132; [1952] 1 All E.R. 1203.

BARRY J. This is a claim for damages for wrongful imprisonment. Despite the fact that the plaintiff sustained no pecuniary damage, this case should certainly not be regarded, in my judgment, as anything in the nature of a storm in a teacup. Apart from the inconvenience, annoyance and humiliation which the plaintiff must undoubtedly have suffered, the right of individual liberty is here in issue. Anyone lawfully on British soil is entitled to the protection of the law, and if he is illegally deprived of his freedom, he has every right to seek the protection of the courts. The defendants do not otherwise contend. Their case is that the immigration officers who caused his detention were properly performing the duties imposed upon them by the Aliens Order, 1953, and they, too, regret the inconvenience (which they say was unavoidable) which the plaintiff suffered as a result.

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[8] (1890) 44 Ch.D. 262.

The situation on April 27, 1955, was this: The plaintiff had left Ireland a few days before; he was returning to Dublin at the time of his detention; he was a person acceptable to the Irish authorities, but he was one to whom the immigration authorities in this country were instructed to refuse leave to land.

A claim for privilege has been put before the court by the Secretary of State for Home Affairs and objection has been taken, and, in my judgment, rightly taken, to the disclosure of certain documents. It is common ground that the plaintiff was a man to whom the immigration officers had been instructed to refuse leave to land in this country.

[His Lordship stated the facts, referred to the evidence, and continued:] I am satisfied that, throughout, the senior immigration officer and the other officials concerned regarded themselves as being in a somewhat difficult position. On their view of their duties under the Aliens Order, 1953, they were under the impression that, in strict law, the plaintiff was not entitled to travel from the north buildings to the central buildings and so to embark on the Aer Lingus flight. I am satisfied that they did their best to secure that the plaintiff was put to as little inconvenience as possible and tried, to the best of their ability, to ensure that he did in fact catch the aircraft which took off at 8.40 p.m.

The question which I have to consider is whether the senior immigration officer and his officials correctly interpreted their powers and duties under the Aliens Order, 1953. If, in fact, they incorrectly interpreted them, it would not be surprising, as the exact effect of the Order upon circumstances of the kind now under consideration is by no means free from doubt. I have had the benefit of a full and elaborate argument as to the correct interpretation of the Order, but even with that advantage I do not pretend that I have complete confidence in the interpretation which I propose to adopt. In these circumstances, I think no possible blame can attach to the senior immigration officer for any misapprehension which he may have had as to the real meaning of the Order.

The Aliens Order, 1953, was made pursuant to powers conferred on the Crown to make regulations by Order in Council imposing restrictions on aliens under section 1 of the Aliens Restriction Act, 1914, as amended by the Aliens Restriction (Amendment) Act, 1919. [His Lordship read articles 1 (1) and 2 (1) (*b*), of the Order, and continued:] It is on article 2 (1) (*b*) that the plaintiff founds his case. Article 2 (2) reads: "Not-"withstanding anything in paragraph (1) of this article, an "immigration officer may at any time—(*a*) give notice to an "alien who is for the time being on board a ship or aircraft "prohibiting him from landing without leave thereunder; or "(*b*) grant or refuse leave to land to an alien who is within "the United Kingdom after landing without leave thereunder; "and thereupon [paragraph (1) of article 2] shall cease to apply "to the alien.". It is conceded that by virtue of the provisions of article 3, which deals with the common travel area, that the plaintiff did not require leave to embark from the United Kingdom. The only requirement, if any, was that of leave to land.

The next material article is 7, which requires every person over 16 to produce certain documents, including a passport, to an immigration officer if so required, and to give information asked for by the immigration authorities. Paragraph (3) of that article gives an express power of detention to immigration officers in the case of aliens who land without previous grant of leave for the purpose of examination under the article. At one time the provisions of article 7 (3) were relied upon by the defendants as a justification for the plaintiff's detention, but, in my judgment, it is clear that the provisions relate solely to aliens who land for the purpose of being examined under the provisions of article 7 (1), and I am quite satisfied that the plaintiff did not land for that purpose but for the sole purpose of embarking in an aircraft at the same port as that in which he had arrived.

Certain other express powers of detention are given to immigration authorities under the Aliens Order, 1953. Article 8 refers to the removal from the country of aliens who have been refused leave to land. By paragraph (4): "An alien to whom leave to "land is refused may be detained, under the authority of an "immigration officer, pending the giving of directions in his case "under paragraph (1) of this article and pending his removal "in pursuance of directions so given; and where any such alien "is on board a ship or aircraft he may, under the like authority, "be removed therefrom for detention under this paragraph." It is quite clear that at no time during the course of this ill-fated visit to London Airport was the plaintiff refused leave to land, and in those circumstances, in my judgment, article 8 (4) has no application to the facts of the present case.

Article 9 relates to aliens who have landed unlawfully in this country, and again confers certain powers upon immigration authorities and others. In the present case it cannot be suggested that, in the first instance at least, the plaintiff landed unlawfully in this country. He landed, it is true, without having obtained leave to do so, but he landed, as I find—and as, indeed, very soon became apparent to the immigration authorities—from an aircraft at an approved port for the purpose only of embarking in an aircraft at the same port. In those circumstances, under the provisions of article 2 (1) (*b*), his landing was lawful, as no leave to land in those circumstances, under article 1 of the Order, is required.

Further than that, there is no evidence that during any part of his enforced sojourn at the London Airport he failed to remain within such premises or limits as were approved for the purpose by an immigration officer. Therefore, it cannot be suggested that at any period the plaintiff was in the position of an alien who had landed unlawfully or of an alien to whom leave to land had been refused. Similarly, it is right to say that the plaintiff was never in the position of an alien to whom leave to land had been granted. It is quite clear that leave to land was at no time either given or refused.

The gist of the problem is this: The defendants' contention is that it is within the sole discretion of the immigration authorities to lay down the prescribed limits or premises in which an alien landing under the provisions of article 2 (1) (*b*) may remain. For various reasons, some of which are obvious, the senior immigration officer considered that aliens landing at the north section of the airport should be confined to the transit hall and certain other buildings in that section of the airport. His view was, and both the defendants' view is today, that if aliens were allowed to stray beyond those very narrow limits and wander off unescorted towards the central buildings, all effective control over their movements would be lost, because, unless a policeman was sent to accompany them, it was perfectly open to them never to proceed to the central buildings at all but to walk out of the airport and so travel to any part of England.

In those circumstances the defendants contend that they were entitled to say that, having landed lawfully under article 2 (1) (*b*), the plaintiff was bound to remain in the transit lounge, or in some part of the buildings of the north section of the airport. All they did was to confine him within that perimeter, and in the circumstances it cannot possibly be alleged that they were guilty of any unlawful or enforced imprisonment. The plaintiff's rights were limited. He could only pray in aid article 2 (1) (*b*) of the Order so long as he remained for the whole period between his landing and embarkation within such premises or limits as may be approved for the purpose by an immigration officer, and the fact that remaining within those limits caused him to lose his flight to Dublin is an unfortunate fact but one which was quite unavoidable, and about which the plaintiff has no legal ground for complaint. According to the defendants' view, if the plaintiff was to proceed outside the narrow confines of the north buildings, or such parts of the north buildings as were approved by the immigration authorities, he required leave to land. He never obtained leave to land, and in those circumstances no wrong has been done to him by insisting that he remain in the north buildings until about 8.20 in the evening.

On the plaintiff's behalf Mr. Scarman puts the case in this way: The plaintiff was undoubtedly detained in the north buildings at the airport, and detained for so long a period that he was unable to catch the aeroplane on which his passage from London to Dublin had been booked. He argues that the defendants must justify that detention. Certain grounds on which they sought to justify it have been shown to be unsound. Article 8 (4), one of the articles which provides an express power of detention, only applies to aliens refused leave to land; and article 7 (3), which again provides an express power of detention, relates only, as I have found, to aliens who have landed for the purpose of examination under that article.

Mr. Scarman concedes that the defendants could have provided themselves with a justification for the plaintiff's detention, because the powers conferred upon the immigration authorities by article 2 (2) could have been utilized at any period during the evening with which we are concerned. It would have been open to the second defendant and the officials under him at any time during that evening to refuse the plaintiff leave to land, even though he had in fact landed lawfully under the provisions of article 2 (1) (*b*). Further, they could have prevented him from leaving the aircraft at all by acting under article 2 (2) (*a*). Mr. Scarman's case is, however, that unless the immigration authorities elected to proceed under article 2 (2) (*b*), they cannot, by indirect means, secure the detention of an alien by a quite arbitrary exercise of their discretion under article 2 (1) (*b*); and here I come to the one vital question in this case: Assume that the immigration authorities do not put into operation their powers to grant or refuse leave to land, can they, by an exercise of their discretion as to the premises or limits within which an alien landed under article 2 (1) (*b*) may remain, effectually defeat the purpose for which the alien in fact landed under that paragraph, namely, for the purpose of embarking in an aircraft at the same port? If they can do so, then the plaintiff has no possible ground for complaint in law, however much he may feel that this was an unreasonable exercise of the powers conferred upon the immigration officials. If they cannot do so, then what are the justifications for the plaintiff's detention during this very considerable period—more than two-and-a-half hours—in the buildings in the north section of the airport?

I have come to the conclusion that, subject to all the other powers vested in them, the immigration authorities cannot so exercise the discretion conferred upon them by the latter limb of article 2 (1) (*b*) as to frustrate the purpose for which that subparagraph was included in the Order. (I do not say "enacted," because it is an Order and not an Act of Parliament.) As I see it, the policy of the Order is that an alien should be allowed to land without leave under certain limited conditions, all but one of which the plaintiff has admittedly fulfilled. He landed from an aircraft, at an approved port, and, as was very soon apparent to the immigration officials, he landed for the purpose only of embarking in an aircraft at the same port. Having fulfilled those conditions, were the defendants entitled to prevent him from carrying out his purpose by limiting the premises or limits within which he might remain between his landing and embarkation in such a way as to render his embarkation impossible? In my judgment they were not. As I see it, the provision contained in article 2 (1) (*b*) was inserted in the Order to confer the privilege of landing without leave on a certain limited class of aliens who were entering the approved airport not for the purposes of visiting the United Kingdom but merely in transit to some other area outside it.

It is true that article 2 (1) (*b*) confers a discretion upon the immigration authorities as to the premises or limits in which the alien may remain while he is upon British soil, but I accept Mr. Scarman's argument that that discretion in effect relates to the geographical situation of the premises or limits in which that alien may be. I do not think that the word "may" confers so wide a discretion upon the immigration officials that they may purely capriciously say that they are going to limit the area in which the alien may remain in such a drastic way that he is faced with the alternative of either returning from whence he came or remaining permanently detained in a small area of the airport from which access to the aircraft in which he wishes to continue his journey cannot be obtained.

The conditions imposed upon the alien, if he is to take advantage of this enabling order, are conditions which he must fulfil. He must land from an aircraft, he must land at an approved port, and he must land for the limited purpose referred to in sub-paragraph (*b*). He must also remain within the approved premises or limits. All those are obligations imposed upon the alien, and unless he complies with them he cannot rely upon sub-paragraph (*b*) and he becomes a person who has unlawfully landed in this country. It seems to me to be a corollary that if a requirement is placed upon an alien to remain within certain prescribed areas, certain areas will in fact be prescribed, and if the immigration authorities prescribe no area at all in which he may remain, or if they prescribe an area which renders his onward flight impossible, then to my mind they are frustrating the whole purpose of this provision and are acting outside the jurisdiction and discretion which is conferred upon them by sub-paragraph (*b*).

I am not impressed as to the dangers to which this interpretation of sub-paragraph (*b*) may give rise. The immigration authorities are armed with ample powers. If they feel it dangerous to allow either the present plaintiff or any other alien to move from the north section of the airport to the central section, they can refuse him leave to land. Further than that, I am inclined to the view that, as they are entitled to approve the premises or limits, it would be quite open to them to say that the alien must travel from the north buildings to the central buildings in a motor-car provided by them or by the aircraft company concerned in which either an immigration official or a policeman is also travelling. Be that as it may, if any danger is apprehended the remedy is the refusal of leave to land. Here the immigration authorities did not refuse leave to land, and in those circumstances I think that their purported detention of the plaintiff under the terms of article 2 (1) (*b*)—namely, by confining the approved area to the north building—was outside their powers and was illegal.

The question therefore arises whether or not the plaintiff can maintain an action for wrongful imprisonment. As I have already indicated, if the immigration authorities were entitled to confine the approved area to the narrow limits to which they did in fact confine it, then the plaintiff could not say that he had been wrongfully imprisoned. If, however, they were not entitled so to confine the permitted area as to prevent him from obtaining access to the aeroplane for the purpose of catching which he had landed at the airfield, then I think that he is entitled to regard that as an unlawful imprisonment. His liberty was restricted to a greater degree than the immigration authorities were entitled to restrict it under article 2 (1) (*b*). The fact that they might have restricted his liberty by employing the powers conferred upon them by other articles of the Order seems to me to be immaterial. It is no answer, when a man says "I have been "unlawfully arrested without a warrant," to say "Well, had I "(the person making the arrest) taken the trouble to go and ask "for a warrant, I would undoubtedly have got it." That would be no answer to a claim for unlawful arrest. Similarly here, although the second defendant and his colleagues could have detained the plaintiff by refusing him leave to land, that does not entitle them to detain him on the grounds on which they did.

No express powers of detention are conferred under article 2 (1) (*b*). Mr. Scarman has rightly conceded that immigration officials would be entitled to a reasonable time in which to satisfy themselves that the alien who arrived at the approved port really did intend to embark in an aircraft at the same port. If the immigration authorities' inquiries had been confined to that question and they had been completed within a reasonable time, the plaintiff would have raised no complaint: certainly Mr. Scarman disclaims any suggestion that he would raise any such complaint on the plaintiff's behalf. Similarly, I think, without deciding the point, that they would be entitled to a reasonable time to consider whether or not to refuse the alien leave to land. Here that point does not appear ever to have been considered at all, and, if it were considered, it would not give rise to the type of inquiry which formed the subject-matter of the various telephone messages and conversations which took place between shortly after 6 o'clock and approximately 8.30 on the night of April 27.

Whatever view one takes of this case, on the interpretation of the law which I now adopt, I cannot see that this delay of nearly two and a half hours could possibly be regarded as reasonable. If I am wrong as to my view of the law, then no question as to reasonable time arises, because the plaintiff has never been unlawfully detained, but on the law as I understand it the plaintiff is entitled to recover damages.

He does not ask for an extravagant figure, but, on the other hand, it would be quite wrong for the court to award a contemptuous figure. No pecuniary damage has been suffered, but the very precious right of liberty—which is a right available to everyone who can for the time being be regarded as a subject by local allegiance to Her Majesty—is one which must be protected. I think that a fair figure which will vindicate the plaintiff's rights without amounting to a vindictive award would be £150. I should have felt fully entitled to increase that amount to a very great extent if there had been any suggestion here that the plaintiff was being ill treated by any of the immigration officials, but I am quite satisfied that they all genuinely considered that they were doing the best possible thing in difficult circumstances, and in my judgment no blame of any kind rests upon them. In these circumstances there must be judgment for the plaintiff for £150.

Judgment for the plaintiff against both defendants.

Solicitors: *Chalton Hubbard & Co. for Marsh & Ferriman, Worthing; Treasury Solicitor.*

E. M. W.

ADDISCOMBE GARDEN ESTATES LTD. AND ANOTHER v. CRABBE AND OTHERS.

C. A.

1957
Nov. 14, 15.

Jenkins, Parker and Pearce L.JJ.

[1956 A. No. 918.]

Landlord and Tenant—Business premises (security of tenure)—"Business"—Members' club—"Any activity carried on by a body "of persons, whether corporate or unincorporate"—Lawn tennis club occupying clubhouse and tennis courts under agreement—Interest of occupiers—Whether tenants or licensees—Club registered under Industrial and Provident Societies Act, 1893, *to carry on business of lawn tennis club—Whether business tenancy—Landlord and Tenant Act,* 1954 (2 & 3 *Eliz.* 2, *c.* 56), *Part II, s.* 23 (2).

Licence or Tenancy—Exclusive occupation—Members' club—Exclusive occupation—Materiality.

By section 23 (1) of Part II of the Landlord and Tenant Act, 1954, security of tenure is given (in certain circumstances) to any tenancy "where the property comprised in the tenancy is or "includes premises which are occupied by the tenant and are so "occupied for the purposes of a business carried on by him. . . ." By section 23 (2) "the expression 'business' includes a trade, "profession or employment and includes any activity carried on "by a body of persons, whether corporate or unincorporate."

The trustees of a members' lawn tennis club registered under the Industrial and Provident Societies Act, 1893, and which, by its rules, carried on the business of a lawn tennis club, entered into an agreement with the owners of tennis courts and clubhouse, whereby the owners purported to license and authorize the trustees to use and enjoy the premises for two years from May 1, 1954, in consideration of monthly payments of "court fees."

The agreement contained a number of clauses providing, inter alia, that the trustees should repair and maintain the premises "in good tenantable repair and condition" and render them up at the expiry of the "licence" in such condition; permit the "grantors" and their agents "at all reasonable times to enter the "premises to inspect their condition and for all other reasonable "purposes." The owners, on their part, agreed, inter alia, that the "grantees" should "quietly enjoy" the premises without interruption. The agreement also contained a provision that the "grantors" might "re-enter and determine the licence in the event "of non-payment of any of the said payments of court fees . . . or "on any breach of the grantees' stipulations."

The agreement expired on May 1, 1956, but thereafter the trustees continued to occupy and use the premises, asserting that the agreement granted them a tenancy which was protected by Part II of the Act of 1954.[1]

In a claim by the owners for injunctions to restrain the trustees from trespassing and ordering them to quit and yield up the premises:—

Held, (1) that the agreement taken as a whole, although described as a licence, on its true construction created the relationship of landlord and tenant and not that of licensor and licensee, for the relationship was determined by the law and not by the label which the parties chose to put on it.

Facchini v. *Bryson* [1952] 1 T.L.R. 1386 applied.

Observations of Denning L.J. in *Errington* v. *Errington* [1952] 1 K.B. 290, 297; [1952] 1 T.L.R. 231; [1952] 1 All E.R. 149 explained.

(2) That the premises were occupied for the purpose of a "business" as defined in section 23 (2) of the Act of 1954, as the

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[1] Landlord and Tenant Act, 1954, Part II. "Security of Tenure for "Business, Professional and other "Tenants." S. 23: "(1) Subject to "the provisions of this Act, this Part "of this Act applies to any tenancy "where the property comprised in the "tenancy is or includes premises "which are occupied by the tenant "and are so occupied for the purposes "of a business carried on by him "or for those and other purposes. "(2) In this Part of this Act the "expression 'business' includes a "trade, profession or employment "and includes any activity carried "on by a body of persons, whether "corporate or unincorporate."

activity of a lawn tennis club was there carried on, and therefore the tenancy which the trustees held under the agreement was protected by Part II of the Act.

Decision of Hilbery J. [1957] 2 Q.B. 615; [1957] 2 All E.R. 205 affirmed.

APPEAL from Hilbery J.

The Shirley Park Lawn Tennis Club Ltd. was a society registered under the Industrial and Provident Societies Act, 1893. Rule 1 of this tennis club provided that "The society (hereinafter "called 'the club') shall be called the Shirley Park Lawn "Tennis Club Ltd.; and its objects are to carry on the business "of a lawn tennis club."

Under an agreement in writing made on April 12, 1954, the plaintiff company, Addiscombe Garden Estates Ltd., owners of the Shirley Park Hotel and tennis courts and clubhouse situated in the hotel grounds, purported to "license and authorize" the defendants, Stuart Brooksby Crabbe, Leonard Oswald Crake and Ronald Walter Arthur Fowler, trustees of the Shirley Park Lawn Tennis Club, to enter upon, use and enjoy the clubhouse and tennis courts and to use certain chattels, including nets and equipment, in consideration of court fees of £37 10s. to be paid monthly "to the hotel." The agreement was in these terms: "Whereas the grantors inter alia carry on business as hotel "proprietors and are the owners of the Shirley Park Hotel "(hereinafter called 'the hotel') and the gardens and pleasure "grounds appurtenant thereto including the premises situate and "known as the Shirley Park Lawn Tennis Club whereby it is "agreed as follows: (1) The grantors hereby license and autho-"rize the grantees to enter upon use and enjoy the following: "(a) the club house with the dressing rooms and other appur-"tenances (including the groundsman's sheds) enjoyed therewith "in Shirley Park Addiscombe Road Croydon aforesaid (b) the "tennis courts (ten hard courts three grass courts and the "practice court) as now laid down in Shirley Park Croydon afore-"said (c) the use of all articles of household use and ornament "at present in and upon the said club house and also the use of "all nets machines tools and equipment in and about the said "premises and now used for the equipment and maintenance "of the said club house and tennis courts all of which are herein-"after referred to as the said chattels . . . (2) This licence shall "extend for the fixed period of two years from the first day of "May 1954 (3) The grantees shall have the use and enjoyment "of the said premises in consideration of their paying to the

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"hotel court fees amounting to £37 10s. per month in advance on the first day of each and every month the first payment to become due and payable on the first day of May 1954

"(4) The grantees jointly and severally agree with the grantors as follows: (i) to make the said monthly payment of court fees to the hotel at the times and in the manner aforesaid (ii) to pay for all gas and electricity supplied to and/or consumed in or upon the said premises including all standing charges (iii) to repair and maintain the said club house with the dressing rooms the said hard and grass tennis courts and the practice court in good tenantable repair and condition (fair wear and tear excepted) and to render the same up upon the expiration or sooner determination of the licence in such good tenantable repair and condition and to repair and maintain the said chattels (fair wear and tear excepted) and to replace or renew at the end of the licence any of the same as may have become destroyed or rendered defective otherwise than by fair wear and tear

"(iv) to manage and manure the said hard and grass courts in a good and husbandlike manner so as to keep the same constantly in good service and playable condition (v) not without the grantors previously written consent to cut down or injure any plants trees bushes or hedges or remove from the said property any soil clay sand or other materials and not to make any excavations thereon except for the purpose of maintaining the said hard and grass tennis courts and the practice court in accordance with the agreement and conditions hereinbefore contained (vi) not to erect any building or other structures upon the said property except such as shall be approved by the grantors

"(vii) to use the said premises as a private lawn tennis club and club house for the convenience of members of the club their guests and their staff only but this clause shall not prevent the club from holding tournaments exhibition matches and social functions on the said premises (viii) not to allow any persons except members guests and servants of the club to use the said premises for any purpose but this clause shall not prevent the club inviting or allowing a reasonable number of members of the general public to enter thereon for the purpose of attending functions specially organized for those interested in the game of lawn tennis (ix) that the grantees will cause the chairman for the time being of the grantors or his nominee to be an ex-officio member of the

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"general committee of the club and that as such he or his "nominee shall be entitled to receive notice of and attend all "meetings of the general committee (x) that the grantees will "cause residents of the Shirley Park Hotel aforesaid who shall "make application to be elected honorary members of the club "save nevertheless that the club may charge them court fees "or house fees for the use and enjoyment of the said premises "(xi) to permit the grantors and their agents at all reasonable "times to enter the said premises to inspect the condition "thereof and for all other reasonable purposes

"(xii) to deliver up the said premises at the termination "of this licence in a condition consistent with the foregoing "provisions (xiii) during the continuance of this licence to "insure against loss or damage by fire in the joint names of "the grantors and the grantees the said club house the said "chattels and any other items of an insurable nature in or "about the said premises to their full insurable value in some "insurance office to be approved of by the grantors and forth-"with to rebuild or reinstate any of the said buildings or said "chattels if and so far as the same may be destroyed or damaged "by fire.

"(5) The grantors agree with the grantees as follows: (i) to "pay all general rates and taxes including water rates and "charges for water arising in respect of the said premises "Provided however that if the water rates and charges for water "exceed the sum of £24 per annum the grantees shall be liable "for the excess of water rates and charges for water over that "figure (ii) that the grantees making the said payment of court "fees and observing the stipulations on their part herein "contained shall during the licence quietly enjoy the said "premises without interruption by the grantors or any person "claiming under or in trust for them.

"(6) It is mutually agreed as follows: (i) that the grantors "may re-enter and determine the licence in the event of non-"payment of any of the said payments of court fees for fourteen "days (whether formally demanded or not) or on breach of any "of the grantees' stipulations (ii) in the event of the said "premises becoming separately assessed for rating purposes "then the grantors shall have the right forthwith to determine "this licence."

After the expiry of the agreement the defendants and members of the club continued to use the premises although no further agreement was concluded between the parties.

The plaintiff company and the second-named plaintiff, Alan Percy Smith, who had bought the property from the plaintiff company on August 1, 1956, brought an action in which they alleged that the defendants and those members of the club who had used the premises after May 1, 1956, had done so without any licence and authority and were trespassers; and that their failure to remove from the premises amounted to a wrongful dispossession of the plaintiff company from May 1, 1956, and of the second-named plaintiff from August 1, 1956.

They accordingly sought (1) injunctions restraining the defendants from trespassing in or upon the premises; (2) ordering them to quit and yield up the premises to the second-named plaintiff; (3) an order for delivery up of the premises; and (4) damages.

The defendants contended that the agreement of April 12, 1954, on its proper construction, granted them a tenancy which was subject to Part II of the Landlord and Tenant Act, 1954; that no notice to terminate the tenancy had been served in accordance with that Act, and that accordingly the tenancy continued in force. By an amendment to the defence made at the trial, which was not objected to by the plaintiffs, it was stated that the club was a society registered under the Industrial and Provident Societies Act, 1893, under the name of the Shirley Park Lawn Tennis Club Ltd., and that the defendants were trustees of that society.

Hilbery J. held that the agreement of April 12, 1954, must be construed as a tenancy agreement and not as a licence, and that this tenancy was protected by Part II of the Landlord and Tenant Act, 1954.

The plaintiffs appealed.

Lionel Blundell for the plaintiffs. Hilbery J. was wrong in holding that the document of April 12, 1954, constituted a tenancy agreement. It expresses plainly an intention that the grantees shall have a right to enter, use and enjoy the premises in the capacity of licensees, and it is plain on reading the document as a whole that that was the right which it was intended to give. That right is a permissive control and not a grant of any state in the premises, and the subject-matter of the contract makes that a rational and business transaction for the parties to enter into, inasmuch as these tennis courts are in the grounds of and close to the hotel and are not bounded by a ring fence.

The test laid down by the Court of Appeal in *Facchini* v. *Bryson*[2] to determine whether an agreement is to be construed as a licence or a tenancy is not disputed. But applying that principle to the present case the court should reach the contrary conclusion to that of the *Facchini* case.[2] Reliance is placed on the observations therein of Denning L.J.[3] as to the subject-matter of the document. The subject-matter of the present agreement is entirely different from that of an ordinary retail shop or dwelling-house. Further, the surrounding circumstances are quite different from those of *Facchini* v. *Bryson*.[4]

As to the provisions of the document of April 12, 1954, it will be observed that by clause 1 the grantees are given the right to enter upon and use and enjoy the premises in question. There is nothing in clause 1 indicative of the grant of any right or interest in the land. Further, the grantees' use and enjoyment of the premises is strictly limited in character. There is no intention that any other club but the Shirley Park Lawn Tennis Club shall use the premises. There is no clause concerning assignment of rights, and *no covenant against assignment or underletting*. This fact alone is enough to differentiate the present case from the *Facchini* case.[4]

It is true that clause 4 (iii) contains a covenant by the grantees "to repair and maintain" the premises "in good tenantable "repair," which might be said to negative the contention that this document should be construed as a licence, but it is submitted that the draftsman has only used that phrase because it lays down a standard of repair known to the courts and thus serves the useful purpose of being the measure of the grantees' repairing obligation. It must also be conceded that by clause 4 (xi) the grantors and their agents have the right to enter and inspect the premises, a provision which might be thought was peculiar to a lease. It is submitted, however, (*a*) that it is a purely declaratory provision, and (*b*) that it must be borne in mind that the club-house was licensed for the sale of alcoholic liquor and therefore it would be locked and the keys would be in the possession of the grantees when not in use, and, accordingly, it was necessary to make some provision for entry and inspection by the grantors.

Errington v. *Errington*[5] shows that the fact that an occupier has exclusive possession is no longer conclusive in favour of the

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[2] [1952] 1 T.L.R. 1386.
[3] Ibid. 1389.
[4] [1952] 1 T.L.R. 1386.
[5] [1952] 1 K.B. 290; [1952] 1 T.L.R. 231; [1952] 1 All E.R. 149.

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view that he holds as a tenant and not as a licensee: see *per* Denning L.J.[6] It is now a principle of law that in special circumstances there can be a licence which grants exclusive possession. If it be held in the present case that the document of April 12, 1954, granted exclusive possession, then it is submitted that there existed special circumstances which accounted for exclusive possession being so granted. [Reference was made to Foa's General Law of Landlord and Tenant, 8th ed., p. 399.]

In the alternative it is submitted that even if the document is held to constitute a tenancy, it is not a tenancy to which the Landlord and Tenant Act, 1954, applies. A lawn tennis club is not a "business" within the meaning of section 23 (2) and the defendants are not entitled to the protection of Part II of the Act. The word "business" is not defined in the Act and therefore it must be assumed that the legislature is using the word in the sense in which it is generally understood. The interpretation given to the word "business" by common usage and in decided cases is something which occupies a man's time by way of occupation or calling. *Hills (Patents) Ltd.* v. *University College Hospital Board of Governors*[7] is not of assistance, because no argument was there addressed to the court on the question whether the activity carried on was a business or not. It was assumed that it was, the whole argument being whether the premises were required for the occupation of the Hospital Board or the Minister of Health. Even had the question been raised, it would have been difficult to argue that the purposes for which the premises were required was not a business.

On the question of construction, it may be that the words of section 23 (2) are wide enough to cover any activity whatsoever if carried on by a body of persons, but such a construction would lead to absurdities. It is submitted that the key to the proper construction of the subsection are the words "includes a trade, "profession or employment," which are intended to remove doubts, if there be any, as to the kind of activities contemplated by the subsection. The words of the subsection do not strictly admit of the ejusdem generis rule, but the principle of the rule should be applied and the word "activity" should be construed as "such activity" in order to avoid the absurdities which would otherwise result. If the meaning of the word "activity" is not so limited, it means that all sorts of strange activities would, if carried on by a group of persons, become protected by Part II of the Act, whereas the intention of that part of the Act is to deal with business activities. The section is not applicable to an ordinary members' club which carries out only recreational and social activities. Parliament could not have intended the section to be so widely interpreted as to include a lawn tennis club, and the defendants should not be entitled to protection. [Reference was also made to *Smith* v. *Anderson* [8] and *Inland Revenue Commissioners* v. *Eccentric Club Ltd.*[9]]

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[6] [1952] 1 K.B. 290, 296, 297.

[7] [1956] 1 Q.B. 90; [1955] 3 All E.R. 365.

Charles Fletcher-Cooke, for the defendants, was not called upon to argue.

JENKINS L.J. stated the facts and continued: It is vital to the plaintiffs' claim for possession of the premises that they should be able to establish that this document described as a licence is in truth a licence, as opposed to a tenancy agreement. If it is a mere licence, then the plaintiffs' claim to possession must follow, for the rights granted by it have some time since expired. If, on the other hand, although described as a licence, it has the effect of a tenancy agreement, then prima facie the plaintiffs must be faced, before they can get possession, with the task of compliance with the provisions of the Landlord and Tenant Act, 1954. But Mr. Blundell has an alternative basis of claim, which is that even though the document in question created a tenancy as distinct from a mere licence, nevertheless the protection of the Landlord and Tenant Act, 1954, can avail the defendants nothing inasmuch as section 23 of the Act, which describes the premises to which the Act applies, applies only to premises used for business purposes.

By section 23 of the Act it is provided: "(1) Subject to the "provisions of this Act, this Part of this Act applies to any "tenancy where the property comprised in the tenancy is or "includes premises which are occupied by the tenant and are so "occupied for the purposes of a business carried on by him or "for those and other purposes. (2) In this Part of this Act the "expression 'business' includes a trade, profession or employ"ment and includes any activity carried on by a body of persons, "whether corporate or unincorporate." Mr. Blundell says that, even if this was a tenancy, it was not a tenancy of premises "occupied for the purposes of a business" within the meaning of those provisions.

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[8] (1880) 15 Ch.D. 247, 260.

[9] [1924] 1 K.B. 390, 413; 40 T.L.R. 208.

As to the first question—whether the so-called licence of April 12, 1954, in fact amounted to a tenancy agreement under which the premises were let to the trustees—the principles applicable in resolving a question of this sort are, I apprehend, these. It does not necessarily follow that a document described as a licence is, merely on that account, to be regarded as amounting only to a licence in law. The whole of the document must be looked at; and if, after it has been examined, the right conclusion appears to be that, whatever label may have been attached to it, it in fact conferred and imposed on the grantee in substance the rights and obligations of a tenant, and on the grantor in substance the rights and obligations of a landlord, then it must be given the appropriate effect, that is to say, it must be treated as a tenancy agreement as distinct from a mere licence.

[His Lordship read the agreement of April 12, 1954, and continued:] First, one must observe that the document is described by the parties as a licence. Secondly, one must observe that the draftsman has studiously and successfully avoided the use either of the word "landlord" or the word "tenant" throughout the document. The nearest to the use of the word "tenant" is the reference to "tenantable repair" in clause 4, subclause (iii); so that if the question depended on the label attached to the document, one would be constrained to say that this, in accordance with its label, was a licence. But if it is right (as I have no doubt it is) to look at the substance of the matter, I think that a different conclusion inevitably ensues.

I might mention, as regards the character of the premises, that we have been supplied with an agreed plan which shows that, although the whole of the premises are not completely enclosed, as it were, in a ring fence, the greater part of them appear to occupy a particular enclave in the extensive grounds of the Shirley Park Hotel, though there are two outlying rectangular portions, one, I think, consisting of tennis courts, and the other containing some other appurtenances. There is nothing in the character of the premises as shown on the plan to make them an unfit subject of a tenancy agreement as distinct from a licence.

Looking at the substance of the matter, what do the grantees get? By clause 1 they are licensed and authorized "to enter "upon use and enjoy" the items mentioned; and it seems to me that those words, taken together, are apt to give to the tenant something in the nature of an interest in the land. I would next observe that in clause 2 provision is made for the licence, as it is called, extending for the fixed period of two years from May 1, 1954. There is thus a term certain which would be appropriate to the grant of a tenancy. Then in clause 3 it is provided that: "The grantees shall have the use and "enjoyment of the premises in consideration" of a payment. The payment is described as a payment of "court fees"; it is fixed at the sum of £37 10s. per month, and it has to be paid in advance on the first day of each month. In all but name, that appears to me to be a rent or reddendum in consideration of the right to "enter upon use and enjoy" the premises which is granted by clause 1.

So far, it seems to me that the rights expressed to be conferred on the grantees are, in substance, the rights of a tenant as distinct from the rights of a mere licensee; and, as I have said, there is the correlative obligation of making monthly payments which, although not so called, are in fact, as it seems to me, in the nature of rent. Then there are the various agreements by the grantees with the grantors in clause 4, beginning with the agreement to make the monthly payment of the court fees very much like the agreement to pay the rent which is always to be found in a tenancy agreement. There is a significant provision in subclause (iii) under which the grantees agree "to repair and "maintain the club house." It seems inappropriate that a mere licensee should be saddled with an obligation to repair. Then one finds as to repairs that the items mentioned are to be maintained "in good tenantable repair," an expression to which I have already called attention. That, one cannot help thinking, to some extent supports the view that the grantees are tenants, although I do not attach very much weight to it, as I am impressed by the argument of Mr. Blundell that "good tenant-"able repair" is a phrase which might have been adopted as giving a standard of repair to serve as the measure of the grantees' repairing obligation. But, for what it is worth, that is, I think, if anything, an indication in favour of tenancy rather than licence.

Then under subclause (iv) there is the obligation to maintain the tennis courts. In subclause (v) there is a provision which, I think, is not without significance. That is the provision under which the grantees shall not "without the grantors' previously "written consent cut down or injure any plants trees bushes or "hedges or remove from the said property any soil clay sand or "other materials and not make any excavations thereon except "for the purpose of maintaining the [tennis courts] in "accordance with the agreement and conditions hereinbefore "contained." The significance of that is that it should have been thought necessary expressly to prohibit the grantees from doing certain things which quite plainly, if they were mere licensees, they would have no right or power to do. What business could a licensee have to cut down or injure plants, trees, bushes or hedges, or to do any other of these things, including the removal of "soil clay sand or other materials"? In a similar sense one may note the provision in subclause (vi): "not to erect "any building or other structures upon the said property except "such as shall be approved by the grantors."

Then there is the provision which Mr. Blundell called in aid, which is the restrictive provision in subclause (vii): "to use the "said premises as a private lawn tennis club and club house for "the convenience of members of the club their guests and their "staff only," and so on; and in subclause (viii): "not to allow "any persons except members guests and servants of the club "to use the said premises for any purpose but this clause shall "not prevent the club inviting or allowing a reasonable number "of members of the general public to enter thereon for the "purpose of attending functions specially organized for those "interested in the game of lawn tennis." In my view, those provisions afford no real assistance to Mr. Blundell, for they are just what one would expect to find in a tenancy agreement of premises intended for use as a lawn tennis club. I do not think that anything turns on subclause (ix), which is the one by which the grantees were to "cause the chairman for the time being of "the grantors or his nominee to be an ex-officio member of the "general committee." That does not seem to me to carry the matter further one way or the other, though it appears to be a provision to which it was difficult to give effect having regard to the rules of the incorporated body, Shirley Park Lawn Tennis Club Ltd. Subclause (x), under which residents of the hotel who should make application were to be elected honorary members of the club, in my view, is simply a privilege reserved to the grantors, and I do not think that it really throws any light on the character of the grantees' interest.

The next provision of importance is the agreement to permit "the grantors and their agents at all reasonable times to enter "the said premises to inspect the condition thereof and for all "other reasonable purposes." The importance of that is that it shows that the right to occupy the premises conferred on the grantees was intended as an exclusive right of occupation, in that it was thought necessary to give a special and express power

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to the grantors to enter. The exclusive character of the occupation granted by a document such as this has always been regarded, if not as a decisive indication, at all events as a very important indication to the effect that a tenancy, as distinct from a licence, is the real subject-matter of a document such as this.

In subclause (xii) there is provision “to deliver up the said premises at the termination of this licence in a condition consistent with the foregoing provisions.” “To deliver up” seems to me to be an expression more appropriate to a tenant with an interest in the land than to a person who has a mere contractual right to be on the land; it is an expression universally used, I think, in all tenancy agreements and leases. The provision as to insurance points in the same direction; it would, I think, be curious if a mere licensee, with no interest in the premises, was made liable for insurance. Then in clause 5, subclause (ii), there is what is practically a common form covenant for quiet enjoyment such as is found in every tenancy agreement or lease; and it seems to me that this clause points strongly in the direction of a tenancy agreement here. In clause 6, subclause (i), there is the provision: “that the grantors may re-enter and determine the licence in the event of non-payment of any of the said payments of court fees for fourteen days (whether formally demanded or not) or on breach of any of the grantees' stipulations.” Those references to re-entry and “non-payment of any of the said payments of court fees for fourteen days (whether formally demanded or not)” are provisions wholly appropriate to a tenancy agreement; and I should have thought that a reference to re-entry was really inappropriate to the case of a licence; the conception of re-entry is the resumption of possession by the landlord, and the determination of the interest of the tenant.

Taking all those considerations together, I am of opinion that the judge was perfectly right in holding, as he did, that this was a tenancy. He was particularly impressed by the express provision entitling the grantors to enter the premises “to inspect the condition thereof and for all other reasonable purposes”; and he held that to be an indication that the right to occupy the premises granted to the grantees was intended to be an exclusive right of occupation, that circumstance, as I have said, being at lowest a strong circumstance in favour of the view that there is a tenancy as opposed to a licence.

But that is by no means the only ground for the judge's decision. It is amply justified also by the other matters to which

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I have referred. The judge cited a useful authority in the shape of the decision of this court in *Facchini* v. *Bryson.*[1] The headnote reads: "Where an employer let his employee into occupation of a house, in consequence of his employment, at a weekly sum payable by him and the occupation had all the features of a service tenancy, the agreement was so construed, notwithstanding a clause that 'nothing in this agreement shall be construed to create a tenancy'; the agreement must be construed as a whole, and their relationship was determined by the law and not by the label which they chose to put on it. The agreement accordingly operated as a tenancy agreement, not a mere licence to occupy, and the employer was not entitled to an order for possession except in accordance with the provisions of the Rent Restriction Acts."

At the beginning of his judgment Somervell L.J. said[2]: "This appeal turns on the construction of an agreement, and it involves one of those problems which parties sometimes set the court when they use words in some of the paragraphs of an agreement indicating one relationship, and use words in other paragraphs of the agreement which would indicate another. The court has to construe the agreement as a whole. The question is whether the document here is a lease or a licence to occupy the premises."

The Lord Justice then referred to the decision in *Three D's Co. Ltd.* v. *Barrow*[3] and said[4]: "I agree with Mr. Megarry that that agreement was not this agreement, and that there are material differences between the two, but what I said about the similar clause in that agreement is, I think, applicable here. I said: 'That provision is one which is only appropriate and relevant if the document is giving to the party who is going to live in the house exclusive possession. I should have thought that it was quite unnecessary if a servant was merely occupying the house that the landlord should stipulate that he should be allowed to go in and see the condition of it' "—the reference there being to a provision comparable to the provision in the present case in clause 4, subclause (xi), as to permitting the grantors to enter for certain purposes.

Then continuing his reference to *Three D's Co. Ltd.* v. *Barrow*[5] he went on[6]: "I think that that is equally applicable

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[1] [1952] 1 T.L.R. 1386.
[2] Ibid. 1387.
[3] (1949) 99 L.J. 564; 14 Conv. 36.
[4] [1952] 1 T.L.R. 1386, 1388.
[5] 99 L.J. 564.
[6] [1952] 1 T.L.R. 1386, 1389.

"in the present dispute whether this was a lease or a licence. "Mr. Megarry asked us to treat it like a declaratory section in "an Act of Parliament, that is to say, merely declaring a right "and not giving one. I do not think that the words are apt to "be considered in that way, but are apt in the sense in which "I thought that they were apt in the other case, namely, they "assume a right to keep the landlord out, if I may so put it, "and state the circumstances and conditions on which he may "enter." Then, after referring to a prohibition of underletting, which has no counterpart here, Somervell L.J. proceeded: "Those seem to me to be the main and operative clauses in "which one would seek to find what the rights as between the "two parties are. It is true that the clause with reference to "the payment does not use the word 'rent,' and that the earlier "part of clause 2 refers to occupation and use. But, taking the "agreement as a whole for the moment, apart from the last two "lines of clause 2, I would have come to the conclusion that this "was a lease."

Denning L.J. agreed, and said [7]: "We have had many cases "lately where an occupier has been held to be a licensee and not "a tenant. In addition to those which I mentioned in *Errington* "v. *Errington* [8] we have recently had three more, *Gorham* "*(Contractors) Ltd.* v. *Field*,[9] *Forman* v. *Rudd*,[10] and *Cobb* v. "*Lane*.[11] In all the cases where an occupier has been held to "be a licensee there has been something in the circumstances, "such as a family arrangement, an act of friendship or "generosity, or suchlike, to negative any intention to create a "tenancy. In such circumstances it would be obviously unjust "to saddle the owner with a tenancy, with all the momentous "consequences that that entails nowadays, when there was no "intention to create a tenancy at all. In the present case, "however, there are no special circumstances. It is a simple "case where the employer let a man into occupation of a house "in consequence of his employment at a weekly sum payable by "him. The occupation has all the features of a service tenancy, "and the parties cannot by the mere words of their contract turn "it into something else. Their relationship is determined by "the law and not by the label which they choose to put on it," and he cites *Customs and Excise Commissioners* v. *Pools Finance*

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[7] [1952] 1 T.L.R. 1386, 1389.

[8] [1952] 1 K.B. 290; [1952] 1 T.L.R. 231; [1952] 1 All E.R. 149.

[9] [1952] C.P.L. 266; 159 E.G. 342.

[10] Unreported.

[11] [1952] 1 T.L.R. 1037; [1952] 1 All E.R. 1199.

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(1937) Ltd.[12] "It is not necessary to go so far as to find the "document a sham. It is simply a matter of finding the true "relationship of the parties. It is most important that we should "adhere to this principle, or else we might find all landlords "granting licences and not tenancies, and we should make a hole "in the Rent Acts through which could be driven—I will not in "these days say a coach and four, but an articulated vehicle."

The present case, of course, has nothing to do with the Rent Acts, but the important statement of principle is that the relationship is determined by the law, and not by the label which parties choose to put on it, and that it is not necessary to go so far as to find the document a sham. It is simply a matter of ascertaining the true relationship of the parties.

We were also referred by Mr. Blundell to *Errington* v. *Errington.*[13] In that case it was held that in very unusual circumstances a lady was a licensee, and entitled to remain in occupation of premises so long as she paid the instalments on a certain mortgage; and in the course of his judgment, Denning L.J. said [14]: "The test of exclusive possession is by no means "decisive." I think that wide statement must be treated as qualified by his observations in *Facchini* v. *Bryson* [15]; and it seems to me that, save in exceptional cases of the kind mentioned by Denning L.J. in that case, the law remains that the fact of exclusive possession, if not decisive against the view that there is a mere licence, as distinct from a tenancy, is at all events a consideration of the first importance. In the present case there is not only the indication afforded by the provision which shows that exclusive occupation was intended, but there are all the various other matters which I have mentioned, which appear to me to show that the actual interest taken by the grantees under the document was the interest of tenants, and not the interest of mere licensees.

For these reasons, I hold that the judge came to a perfectly right conclusion when he decided that this must be treated as a tenancy agreement.

There remains the second branch of Mr. Blundell's argument, which is, as I have said, that although this may be a tenancy agreement, the tenancy is not one to which the Landlord and Tenant Act, 1954, applies, because the premises were not "occupied for the purposes of a business." Mr. Blundell has said all that possibly could be said in favour of the view that the premises here in question were not occupied for the purposes of a business carried on by the tenants. But, in my view, the plain language of the Act is too strong for him. I read again subsection (2) of section 23: " In this Part of this Act the expression " 'business' includes a trade, profession or employment and " includes any activity carried on by a body of persons, whether " corporate or unincorporate." Here the premises were used for the activities of a body of persons called the Shirley Park Lawn Tennis Club, and activities were there carried on, whether one should look at the individual members, or at the incorporated body. " A body of persons, whether corporate or unincor- " porate "—it matters not which—was carrying on on the premises an activity in the shape of a lawn tennis club. The premises were, therefore, in my judgment, the subject of a tenancy to which the Act applies.

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[12] [1952] 1 T.L.R. 792; [1952] 1 All E.R. 775.

[13] [1952] 1 K.B. 290.

[14] Ibid. 297.

[15] [1952] 1 T.L.R. 1386, 1389.

Accordingly, for the reasons that I have endeavoured to express, I think that this appeal fails, and should be dismissed.

PARKER L.J. I agree, and there is very little that I can usefully add. The position, as I see it, is that though the agreement in question is labelled a licence, almost all, if not all the clauses in it are appropriate, and more appropriate, to a tenancy agreement. Not only that, but three, in my view, are completely inconsistent with the document being a licence, those being clause 4, subclause (xi), permitting the grantors to enter the premises and inspect; clause 5, subclause (ii), the ordinary covenant for quiet enjoyment—enjoyment of the premises, and not of any rights granted—and clause 6, subclause (i), the right to enter and determine upon non-payment of fees, whether formally demanded or not.

Mr. Blundell, who has said everything that can be said for the plaintiffs, draws our attention to the plan of the premises in question; and he stresses that the subject-matter here is not the ordinary private dwelling-house, which has been considered so often in connexion with the Rent Acts, but parcels of land not in a ring fence, some of them separated from each other, and all in and close to the hotel. It seems to me, however (and, indeed, Mr. Blundell admits this), that all the parcels referred to in the agreement and set out on the plan are precise enough to constitute parcels to a tenancy agreement; and, accordingly, I do not think that the nature of the subject-matter affects the plain intention as expressed in the agreement itself. Nor do I think,

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for the reasons given by my Lord, that Mr. Blundell can derive any comfort from *Errington* v. *Errington*.[16]

As regards the second part of the case, it appears to me that it is quite impossible to argue that there is any real limitation on the words "any activity." Those words must, I think, be read as enlarging the scope of what goes before, otherwise the subsection would have read: "The expression 'business' "includes a trade, profession or employment carried on by any "person," thus covering "individuals" in the singular and plural, and "persons whether corporate or unincorporate." It seems to me here that "any activity" means what it says, and that this registered society, through their trustees, were carrying on an "activity."

For those reasons I would dismiss the appeal.

PEARCE L.J. I agree.

Appeal dismissed.
Leave to appeal to the House of Lords refused.

Solicitors: *Summer & Co.; Currey & Co.*

J. A. G.

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[16] [1952] 1 K.B. 290.

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Feb. 11, 12;
Mar. 6.

Hodson and Pearce L.JJ. and Upjohn J.

BRITISH LAND CO. LTD. *v.* HERBERT SILVER (MENSWEAR) LTD.

[Plaint No. 669.]

Landlord and Tenant—Rent restriction—Premises within the Acts—Shop—Business premises with living accommodation above—Whether let as a separate dwelling—Sitting tenant in residential part at time of lease—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *ss.* 1, 12 (2) *and* 14—*Rent and Mortgage Interest Restrictions (Amendment) Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 16—*Rent and Mortgage Interest Restrictions Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3 (1) *and* (3).

In July, 1947, the plaintiffs purchased the freehold of premises consisting of a shop and residential accommodation, subject to a lease which was due to expire in June, 1956, at a rent which at the material time was £90 per annum. D., the lessee, who carried on business in the shop, sublet, with the plaintiffs' consent, the residential part of the premises to M. at an inclusive rent of £1 a week. In February, 1955, D. sold the goodwill of her business to the defendant company, subject to her being able to obtain from the plaintiffs a new lease for 15½ years at a rent of £325 per annum. That condition was fulfilled, and on May 4, 1955, D. surrendered her old lease and was granted by the plaintiffs a new lease, which she assigned to the defendants with the consent of the plaintiffs, M. continuing in occupation of the residential part of the premises. In September, 1956, the defendant company claimed that the premises were subject to the control of the Rent Acts and that they were entitled to be repaid the difference between the standard rent of £90 and the rent of £325. The plaintiffs brought proceedings in the county court claiming arrears of rent, and the defendants counterclaimed the return of excess rent allegedly overpaid:—

Held, that by virtue of section 3 (3) of the Act of 1939,[1] the premises were let as a separate dwelling-house, notwithstanding that, subject to M.'s sitting tenancy, they were let as business premises, for the only relevance of the fact that at the time of the demise the residential part of the premises was occupied by a sitting tenant was that, in this case, it afforded conclusive evidence of the intention of the parties as to the residential purpose for which that part of the premises would be used; accordingly, the defendants were liable only for the standard rent of £90 a year.

Dicta of Jenkins L.J. in *Levermore* v. *Jobey* [1956] 1 W.L.R. 697; [1956] 2 All E.R. 362, and of Evershed L.J. in *Wolfe* v. *Hogan* [1949] 2 K.B. 194; [1949] 1 All E.R. 570 applied.

Appeal from Judge Rawlins, sitting at Reading County Court.

In July, 1947, the plaintiffs, the British Land Co., Ltd., purchased the freehold of 14, High Street, Godalming, Surrey, subject to and with the benefit of a lease of the same for a term of years, which was due to expire on June 24, 1956, at a rising rent which at all material times was £90 per annum. At the time of this purchase the lessee (an assign of the original lessee) was a Miss Daniels, who carried on upon the shop part of the premises the business of a ladies' outfitter. The ground floor of the premises consisted of a shop, and at the back residential accommodation (consisting of a kitchen, bathroom and water closet) to which there was a connecting door. On the first floor there was a living room and three bedrooms, reached by a staircase from the residential part of the ground floor. The residential part of the premises was let to a subtenant who went out of possession in or before 1952.

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[1] Rent and Mortgage Interest Restrictions Act, 1939, s. 3: "(3) . . . "the application of the principal Acts, "by virtue of this section, to any "dwelling-house shall not be excluded "by reason only that part of the "premises is used as a shop or office "or for business, trade or professional "purposes; . . ."

On February 2, 1953, Miss Daniels, with the consent of the plaintiff company, let the residential part of the premises to Miss Emily Medland on a weekly tenancy at an inclusive rent of £1 per week. Miss Medland was still in occupation as a contractual tenant upon the terms of that tenancy. By an agreement in writing dated February 10, 1955, Miss Daniels agreed to sell to the defendant company, Herbert Silver (Menswear) Ltd., the goodwill of her business, and certain fixtures and fittings, for the sum of £1,685. The agreement was expressed to be conditional upon Miss Daniels obtaining from the plaintiff company a new lease of the premises at a rent of £325 per annum for a term of 15½ years from December 25, 1954. That condition was fulfilled, the existing lease was surrendered, and on May 4, 1955, the plaintiff company granted a new lease to Miss Daniels. On June 25, 1955, Miss Daniels assigned that lease to the defendant company in accordance with the agreement of February 10, 1955, with the written consent of the plaintiff company.

In the above circumstances the defendant company on September 19, 1956, wrote to the plaintiff company claiming that the premises were subject to the Rent Restriction Acts and that it was entitled to be repaid the difference between the rent of £325 and the standard rent, or to set off the excess against future rent. The defendant company refused to pay more than the standard rent and on March 8, 1957, the plaintiff company issued a plaint in the Reading County Court claiming arrears of rent due by the terms of the lease. The defendant company counterclaimed for rent alleged to be overpaid.

The county court judge decided that the premises were within the protection of the Rent Restrictions Acts and he ordered repayment of rent paid in excess of the standard rent.

The plaintiff company appealed.

R. E. Megarry Q.C. and *Paul Baker* for the plaintiff landlords. The question is whether this lease is subject to the Rent Restrictions Acts, as the county court judge has held. At the time of the granting of the lease the residential part of the premises was occupied by a subtenant. The tenant's case is that the existence of the sublease clothes all the premises with the mantle of the Rent Acts. The plaintiffs contend that the existence of the subtenancy does not attract the protection of the Rent Acts.

The defendants have to show that this is a letting of a dwelling-house. The lease was of the shop and the reversion of the dwelling portion of the premises. The defendants rely on *Anspach* v. *Charlton Steam Shipping Co. Ltd.*,[2] but the sort of a letting that will establish a standard rent is entirely different from the sort of letting that is protected by the Rent Acts. Unless the defendants establish that " let " means the same as " let as a separate " dwelling " the *Anspach* case [2] is not an authority against the plaintiffs. At no time could it be said that these premises were let as a separate dwelling-house. The lease to Miss Daniels was essentially a lease of business premises. Any estate agent wanting to introduce a purchaser to this property would seek out someone interested in business premises only. No one could say that it was a letting of a dwelling-house as such when in fact the living premises were already let to a separate tenant at the date of the lease. If at that date the residential part of the premises had been vacant, so that the defendant company could have installed a manager, or, with the consent of the lessors, have sublet the residential part, it is conceded that the premises would be properly described as premises let as a separate dwelling-house and therefore subject to control. That was expressly decided in this court on November 12, 1956, in the unreported case of *Rofe* v. *Sidney McFarlane Ltd.*[3] The right approach to the present case is to go back to the parliamentary provisions to consider what were the purposes of the Rent Acts and what are the objects to be achieved in a case where there is a right to use a shop and receive rent from a tenant upstairs. The purpose of the Rent Acts was to protect the tenant in his home; but this court should not be induced to find in favour of the tenant in this case by saying that such a tenancy should be encouraged.

In *Carter* v. *S.U. Carburetter Co.*[4] the question whether there was a letting of a separate dwelling was not argued, but the fact that a limited company can be protected as to rent, although it cannot claim a statutory tenancy, was decided. The mere letting of a reversion is not a letting of a dwelling-house. No one could regard such a letting as this as the letting of premises as a separate dwelling-house. Indeed, no one could sensibly say that it was a letting of a dwelling-house as such when in fact the premises were already let to a separate residential tenant.

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[2] [1955] 2 Q.B. 21; [1955] 1 All E.R. 693.

[3] C.A., Nov. 12, 1956; see [1957] J.P.L. 901; (1957) 168 E.G. 584.

[4] [1942] 2 K.B. 288; 58 T.L.R. 348; [1942] 2 All E.R. 228.

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[*Signy* v. *Abbey National Building Society*[5]; *Wheeler* v. *Wirral Estates Ltd.*[6]; *Stagg* v. *Brickett*[7]; *Macmillan & Co. Ltd.* v. *Rees*[8]; *Court* v. *Robinson*[9]; *Mitchell* v. *Barnes*,[10] and *Haskins* v. *Lewis*[11] were also referred to.]

G. G. Baker Q.C. and *Roger Willis* for the defendant tenants. In answer to the last two sentences of the argument of counsel for the plaintiffs it is submitted that The Rent Acts, by Megarry, 8th ed., section 6, p. 77, correctly sets out, under the heading "Meaning of dwelling," what is the true position. It appears to be immaterial whether the person who dwells on the premises is the tenant or his subtenant. The court must look at the actual facts and see for what purpose as to user the premises were let. The only relevant sections of the Rent Acts are section 1 of the Act of 1920, as amended by section 3 (1) of the Act of 1939. Section 12 (1) of the Act of 1920 is only a definition section, and section 12 (2) has nothing to do with this case. It is submitted that these premises were let as a separate dwelling. There is no authority to the contrary and such authority as there is is in the tenants' favour.

Anspach v. *Charlton Steam Shipping Co. Ltd.*[12] is decisive of this case, and *Carter* v. *S.U. Carburetter Co.*[13] is also conclusive in the tenants' favour, because a limited company can never itself have a home. It has to put somebody in occupation of the premises, and it matters not whether that somebody is an employee, on a service tenancy, or some outsider. The lease of 1938 created, it is admitted, a standard rent, and it is a most important document. There is not the slightest difference between the 1938 letting and the 1955 letting. Nor could there be the slightest doubt that if there had been no subtenant in the living accommodation, that letting would have been the letting of a dwelling-house, and it would be a separate dwelling. It is important to keep in mind section 3 (3) of the Act of 1939, the terms of which are disregarded by the arguments for the plaintiffs. It does not matter whether the dominant user of the premises is the business part. The nature of the premises cannot be changed from a dwelling-house simply because there is a subtenant already dwelling in the flat and the tenant of the head lease has only a reversion of the living accommodation. That factor cannot make any difference to the essential nature of these premises. Schedule I, paragraph (*d*), to the Act of 1933 contains a provision that if a tenant sublets the whole of the premises, it may take the dwelling out of control, but it is submitted that occupation by the head tenant has no bearing on this case. Jenkins L.J. in *Levermore* v. *Jobey* [14] approved the judgment of Evershed L.J. in *Wolfe* v. *Hogan*,[15] in which the citation from Megarry's Rent Acts was approved, and it is submitted that the decision in *Anspach* v. *Charlton Steam Shipping Co. Ltd.*[16] is conclusive of the present case. The whole of the argument for the plaintiffs was intended to distinguish the *Anspach* case.[16] *Ebner* v. *Lascelles* [17] was a decision which this court should follow although it is not binding on the court. The cases cited for the plaintiffs were cases which did not come within the Rent Restrictions Acts. [Reference was also made to the reasoning of Denning L.J. in the *Anspach* case [18] and to the decisions in *Wheeler* v. *Wirral Estates Ltd.*[19]; *Whitty* v. *Scott-Russell* [20]; *Shooter* v. *Gaitley* [21] and *Hyman* v. *Steward*.[22]]

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[5] [1944] K.B. 449; 60 T.L.R. 272; [1944] 1 All E.R. 448.

[6] [1935] 1 K.B. 294, 297 et seq.; 51 T.L.R. 73.

[7] [1951] 1 K.B. 648; [1951] 1 T.L.R. 82; [1951] 1 All E.R. 152.

[8] (1946) 175 L.T. 86; [1946] 1 All E.R. 675.

[9] [1951] 2 K.B. 60; [1951] 1 All E.R. 209.

[10] [1950] 1 K.B. 448; 65 T.L.R. 734; [1949] 2 All E.R. 719.

[11] [1931] 2 K.B. 1; 47 T.L.R. 195.

[12] [1955] 2 Q.B. 21.

[13] [1942] 2 K.B. 288.

Megarry Q.C. replied.

Cur. adv. vult.

March 6. Hodson L.J. The judgment of the court will be read by Upjohn J.

Upjohn J. This is an appeal from the judgment delivered on November 11, 1957, by Judge Rawlins at Reading, deciding in favour of the defendants that certain premises were within the protection of the Rent Restrictions Acts, and he ordered repayment of rent paid in excess of the standard rent.

[His Lordship stated the facts as set out above and continued:] The condition under which the defendants agreed to purchase the goodwill of Miss Daniels's business was fulfilled; the existing lease was surrendered and on May 4, 1955, the plaintiff company granted a new lease to Miss Daniels. Clause 1 was, so far as relevant, in these terms: "1. In consideration

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[14] [1956] 1 W.L.R. 697; [1956] 2 All E.R. 362.

[15] [1949] 2 K.B. 194; [1949] 1 All E.R. 570.

[16] [1955] 2 Q.B. 21.

[17] [1928] 2 K.B. 486; 44 T.L.R. 460.

[18] [1955] 2 Q.B. 21.

[19] [1935] 1 K.B. 294; 51 T.L.R. 73.

[20] [1950] 2 K.B. 32; 66 T.L.R. (Pt. 1) 1003; [1950] 1 All E.R. 884.

[21] (1935) 80 S.J. 74.

[22] [1925] 2 K.B. 702; 41 T.L.R. 501.

"of the rents hereinafter reserved and of the covenants on the "part of the lessee hereinafter contained the company hereby "demise unto the lessee all that messuage or shop and premises "situate and being number 14 High Street Godalming in the "County of Surrey as the same is in the occupation of the "lessee." Then followed certain exceptions and reservations, and the clause continued: "To hold the premises hereby demised "unto the lessee from December 25, 1954, for the term of fifteen "years and six months of another year yielding and paying there-"for during the said term yearly and proportionately for any "fraction of a year the rent of £325 such rent to be paid without "any deduction except for landlord's property tax by equal "quarterly instalments in advance on the usual quarter days the "first of such instalments to become due and payable on the "signing hereof." Clause 2 contained a number of repairing and other covenants, and subclause (21) contained certain covenants restrictive of user but, as it has not been suggested that, in the circumstances mentioned in a moment, it prohibits the lessee or her subtenants from using the residential part as living accommodation, we need not read it.

It is at once obvious that the subject-matter of the demise of May 4, 1955, was not free from ambiguity, and the plaintiff company in fact pleaded that the residential part of the premises in the occupation of Miss Medland was not included in the demise. That plea was, however, abandoned before the county court judge, and counsel for the plaintiff company concedes that the demise did include the residential part of the premises subject to and with the benefit of Miss Medland's weekly tenancy, and the lease must either be so construed or, alternatively, for the purposes of this case, be rectified accordingly. That, however, is without prejudice to the question—should it ever arise—whether as against the plaintiff company Miss Medland is entitled to the protection of the Rent Restrictions Acts. Clearly she is so entitled as against Miss Daniels and her successors in title, the defendant company.

The transaction into which the defendant company entered was from start to finish a business transaction with no doubt the rent of £325 negotiated principally upon the suitability of the site as business premises, but having regard to the profit rental of £52 per annum, yet on September 19, 1956, the defendant company wrote claiming that the premises were subject to the Rent Restrictions Acts and that it was entitled to be repaid the difference between the rent of £325 and the standard rent or to set off the excess against future rent. The defendant company's claim is utterly without any merit, but it is entitled to take the point and, if established, to relief accordingly. The defendant company refused to pay more than the standard rent, so on March 8, 1957, the plaintiff company issued a plaint in the county court claiming arrears of rent due by the terms of the lease; and the defendant company counterclaimed for rent allegedly overpaid.

The parties have either agreed, or it is conceded, that (1) if the demised premises were rent controlled they were first controlled by the Rent Restriction Act of 1939, and the standard rent for the purposes of the Acts is £90 per annum; (2) that at all material times the rateable value of the demised premises was £66; and (3) that so far as the future is concerned the demised premises will in any event become decontrolled by the Rent Act, 1957. There is, therefore, no issue before the court upon the figures.

We must now refer to some sections of the Rent Restrictions Acts. The defendant company's claim depends on section 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which, as amended by the Rent and Mortgage Interest Restrictions Act, 1939, and omitting references to mortgage interest, is as follows: "Subject to the provisions of this Act "where the rent of any dwelling-house to which this Act applies ". . . has been since September 1, 1939, or is hereafter increased "then if the increased rent exceeds the standard rent by more "than the amount permitted under this Act . . . the amount of "such excess shall notwithstanding any agreement to the con-"trary be irrecoverable from the tenant." Section 12 (2), so far as relevant, is in these terms: "This Act shall apply to a "house let as a separate dwelling where either the annual amount "of the standard rent or the rateable value does not exceed . . . "(c) elsewhere, £78, and every such house or part of a house "shall be deemed to be a dwelling-house to which this Act "applies." By section 14 of the Act of 1920 sums which are irrecoverable by virtue of the Act if paid may be recovered from the landlord or deducted from any rent payable by the tenant. Section 16 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, further defined "dwelling-house" in these terms: "Dwelling-house has the same meaning as in the "principal Acts, that is to say, a house let as a separate dwelling "or a part of a house being a part so let."

The last Act to which we must refer is the Rent and Mortgage Interest Restrictions Act, 1939. Section 3 (1) applied the Rent

Acts to every dwelling-house outside London or Scotland where the rateable value did not exceed £75. Section 3 (3) is important and is, so far as relevant, in these terms: " . . . the application " of the principal Acts by virtue of this section to any dwelling-" house shall not be excluded by reason only that part of the " premises is used as a shop or office or for business, trade or " professional purposes."

The question which has to be answered is really a very short one. Bearing in mind section 3 (3) of the Act of 1939, can these premises be properly described for the purposes of the Rent Acts as a house let as a separate dwelling or part of a house being a part so let?

Mr. Megarry, for the plaintiff company, argued that this letting could not properly be regarded as a letting of premises as a dwelling-house at all. The lease to Miss Daniels was essentially a lease of business premises. He illustrated his point in this way. Any estate agent, he said, wanting to introduce a purchaser to the property would seek out some one interested in business premises and business premises only. He would offer them as such, adding that there was £1 a week coming in as the rent of controlled premises. The rent to be paid, he argued, would be negotiated solely in relation to the business part of the premises bearing in mind that it was producing an income of £52 per annum. No one, he submitted, could regard such a letting as the letting of premises "as a separate dwelling-house." Indeed, he contended that no one could sensibly say that it was a letting of a dwelling-house as such when in fact the premises were already let to a separate residential tenant.

As we understand Mr. Megarry's argument, it essentially depends upon the fact that in this case there was a sitting tenant in rent-controlled premises at the time of the lease. He concedes that if at the date of the lease the residential part of the premises had been vacant, leaving it open to the defendant company to instal a manager there, or with the consent of the plaintiff company to sublet that accommodation, he could not escape the conclusion that the premises would be properly described as premises let as a separate dwelling-house and, therefore, subject to control. That was expressly decided in this court on November 12, 1956, in *Rofe* v. *Sidney McFarlane Ltd.*[1]

Mr. Baker, for the defendant company, submitted that you must look at the actual facts and see for what purpose as to user the premises were let. You find that, construing the lease in the manner already mentioned, in this case a letting of property "as a separate dwelling" for the parties contemplated continued user of the residential part of the premises as such. It cannot matter, he submitted, whether there was a sitting tenant or not. You cannot change the nature of the letting or of the premises merely because a tenant is already in occupation. He further submitted that this case was covered by the decision of this court in *Anspach* v. *Charlton Steam Shipping Co. Ltd.*[2] He pointed out (and in our judgment it must be taken as clearly settled by authority binding on this court) that, so far as the Rent Restrictions Acts affect the recovery of rent due under a contractual tenancy, they apply as well to the case when a company is the tenant as to the case of an individual, although the company is incapable of enjoying personal occupation, but can only do so through its servants, agents, licensees or subtenants: *Carter* v. *S.U. Carburetter Co.*[3]; *Anspach* v. *Charlton Steam Shipping Co. Ltd.*[4] That, in our judgment, is indeed only one example of the wider proposition that to secure the protection of the Acts during the subsistence of a contractual tenancy it is not necessary to show that the tenant either intended to occupy or in fact occupied the premises personally: *Ebner* v. *Lascelles*[5]; *Whitty* v. *Scott-Russell.*[6]

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[1] C.A., Nov. 12, 1956; see [1957] J.P.L. 119; (1957) 168 E.G. 584.

There was some discussion before us as to the moment of time at which the issue whether the premises are let as a separate dwelling-house must be decided. When suing for rent unpaid or for excess rent overpaid, the latest time would seem to be the date of the issue of the plaint when the cause of action must have accrued. It is quite different from a claim for possession. As there has been no change in the circumstances between the letting in 1955 and the issue of the plaint in 1957, it seems unnecessary to say more on this subject.

A long line of authorities, for the most part in this court, has established that on the issue whether the premises are let as a separate dwelling you must look to the bargain made between the parties and see for what purpose the parties intended the premises would be used. The first place to ascertain their intentions is in the lease itself. If that does not provide an answer, you look to all the surrounding circumstances and see what must have been in the contemplation of the parties; if that yields no

[2] [1955] 2 Q.B. 21; [1955] 1 All E.R. 693.

[3] [1942] 2 K.B. 288; 58 T.L.R. 348; [1942] 2 All E.R. 228.

[4] [1955] 2 Q.B. 21.

[5] [1928] 2 K.B. 486.

[6] [1950] 2 K.B. 32; 66 T.L.R. (Pt. 1) 1003; [1950] 1 All E.R. 884.

solution you must look to the nature of the premises and the actual user at the relevant time. All the earlier authorities have been very recently reviewed in this court by Jenkins L.J. in *Levermore* v. *Jobey*,[7] and we do not propose to refer to them again, but will content ourselves with one sentence from Mr. Megarry's book on the Rent Acts, which was approved by Evershed L.J. in *Wolfe* v. *Hogan*[8]: "Where the terms of the tenancy "provide for or contemplate the use of the premises for some "particular purpose, that purpose is the essential factor, not the "nature of the premises or the actual use made of them." This part of the judgment of Evershed L.J. was quoted by Jenkins L.J. with approval in *Levermore* v. *Jobey*,[9] and the quotation from Mr. Megarry's book has been approved on at least two other occasions in this court: see The Rent Acts, by Megarry, 8th ed., p. 58.

Applying that test to this letting, it seems clear that there can only be one answer. The demised premises included the residential part of the premises; the lease (construing it, as admittedly it must be construed, as subject to and with the benefit of Miss Medland's tenancy) plainly contemplated that such part would be used as a separate dwelling-house. Bearing in mind section 3 (3) of the Act of 1939, that provides an affirmative answer to the question: Were the premises let as a separate dwelling-house?

In our judgment, the only relevance of the fact that at the time of the demise the residential part of the premises was occupied by a sitting tenant on a rent-controlled tenancy is that in this case it affords conclusive evidence as to the intentions of the parties. It is otherwise irrelevant.

No doubt the parties reasonably regarded the arrangements made in 1955 between the plaintiff company, Miss Daniels and the defendant company as a purely business transaction relating to business premises with the benefit of a rent-controlled tenancy bringing in £52 per annum. The plaintiffs' argument, however, overlooks the point that the transaction in fact involved the demise of a dwelling-house, albeit with the benefit of a subdemise, with the intention that it should be used as such. We agree with the county court judge when he said in reference to Mr. Megarry's argument that "the fact that the defendants had "no immediate right to the residential portion of the premises

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[7] [1956] 1 W.L.R. 697; [1956] 2 All E.R. 362.

[8] [1949] 2 K.B. 194, 203; [1949] 1 All E.R. 570.

[9] [1956] 1 W.L.R. 697.

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"does not prevent the premises from being let as a dwelling-"house."

We agree with Mr. Megarry that *Anspach* v. *Charlton Steam Shipping Co. Ltd.*[10] does not cover this case, because, as the county court judge pointed out in his judgment, it was a decision on section 12 (1) of the Act of 1920 made upon an application to fix the standard rent. It has been settled by the House of Lords that the standard rent may be fixed by reference to rent paid when the premises are not controlled: *Capital & Provincial Property Trust Ltd.* v. *Rice.*[11]

Nevertheless, in view of Mr. Megarry's argument, some of the observations of Denning L.J. in the *Anspach* case[12] are of some persuasive force. In that case certain premises were subject to an existing furnished tenancy in 1940. The owners in that year granted a five years' lease of the flat subject to and with the benefit of the furnished tenancy to a property company. Denning L.J. said[13]: "Mr. Blundell's third point was that the lease in 1940 "was in its nature a letting for business purposes. It was a "business transaction not within the Acts. I cannot agree. The "lease was a letting of a dwelling-house as a separate dwelling, "and it is not deprived of that character simply because the "lessee was a limited company who could only occupy by servants "or agents or by subtenants. This is in accord with the view "expressed by Bailhache J. in *Prout* v. *Hunter*,[14] by Charles J. "in *Ebner* v. *Lascelles*,[15] and it is implicit in *Carter* v. *S.U.* "*Carburetter Co.*[16]"

In our judgment the county court judge reached a perfectly correct conclusion and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Russell, Sons & Bass; Cunliffe & Mossman for Hewett & Pim, Reading.*

A. W. G.

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[10] [1955] 2 Q.B. 21.

[11] [1952] A.C. 142; [1951] 2 T.L.R. 557; [1951] 2 All E.R. 600.

[12] [1955] 2 Q.B. 21.

[13] Ibid. 27.

[14] [1924] 2 K.B. 736; 40 T.L.R. 868.

[15] [1928] 2 K.B. 486; 44 T.L.R. 460.

[16] [1942] 2 K.B. 288.

1957
Dec. 19, 20.

Salmon J.

BRITISH IMEX INDUSTRIES LTD. *v.* MIDLAND BANK LTD.

[1957 B. 3705.]

Banking — Letter of credit — Terms of payment — Credit payable on presentation of sight drafts accompanied by shipped bills of lading —Goods shipped under bills of lading containing clause excusing shipowners from correct delivery unless special conditions as to marking of goods complied with—Beneficiaries' right to payment on presentation of " clean " bills of lading.

Sale of Goods—C.I.F.—Letter of credit.

Shipping—Bill of lading—" Clean bill "—Hague Rules—Meaning of " clean bill "—Additional printed clause excusing shipowners from obligation for correct delivery of iron and steel goods unless specified conditions as to securing and marking complied with—Validity—Hague Rules, art. IV, r. 2, *paras.* (*n*), (*o*)—*Carriage of Goods by Sea Act,* 1924 (14 *&* 15 *Geo.* 5, *c.* 16), *Sch., art. IV, r.* 2 (*n*), (*o*). *Ships' names—Nordstern.*

Commercial Court—Value of—Speed.

An English bank, on receipt of a small commission, confirmed an irrevocable credit for £23,000 opened by a foreign bank in favour of the plaintiffs and undertook to honour all drafts drawn by the plaintiffs if drawn and presented in accordance with the terms of the credit. Under the credit, the money was payable to the plaintiffs on presentation of sight drafts accompanied by invoices and " shipped bills of lading " evidencing shipment by a certain date of a quantity of steel bars from any European port to Aqaba, Jordan. Shipment took place from Antwerp within the time prescribed in the credit under bills of lading which incorporated the Hague Rules and which included, among the printed clauses on the back of the bills, a clause (additional clause B) providing that, in the case of iron and steel cargo, the vessel would not be responsible for correct delivery or for expenses incurred at the port of discharge " consequent upon insufficient securing or marking . . . " unless (a) every piece is distinctly and permanently marked with " oil paint; (*b*) every bundle is securely fastened, distinctly and " permanently marked with oil paint and metal tagged, so that " each piece or bundle can be distinguished at port of discharge."

After shipment, the plaintiffs presented sight drafts for £21,468 to the bank, tendering therewith the documents specified in the letter of credit, but the bank refused to pay them on the ground that there was no acknowledgment on the face of the bills of lading that the terms of additional clause B had been complied with. In an action by the plaintiffs for £21,468:—

Held, (1) that a credit, such as the present, which provided for the presentation of " bills of lading " without further qualification, called for " clean " bills of lading, that was to say, bills which contained no reservation by way of endorsement, clausing or otherwise, to suggest that the goods or packing were defective; and therefore, as the bills presented by the plaintiffs were "clean" bills of lading, and there was nothing in the letter of credit which called for an express acknowledgment that the terms of additional clause B had been complied with, the bank had no right to insist on any such acknowledgment before payment.

Semble, that it is not the duty of a confirming bank to concern itself with the clauses printed on the back of the bills of lading or to consider their legal implications, its duty being no more than to satisfy itself that the correct documents had been presented and that no endorsement appeared on the bills of lading which might indicate some defect in the packing or the goods.

Dicta of Scrutton L.J. in *National Bank of Egypt* v. *Hannevig's Bank* (1919) 1 Ll.L.Rep. 69, reported in Legal Decisions Affecting Bankers, vol. 3, pp. 213, 214, followed.

(2) That, even if the bank was under a duty to examine the clauses on the back of the bills of lading and to consider their legal effect, no express acknowledgment such as that contended for by the bank was required by the terms of additional clause B in so far as it complied with article IV, rule 2, paras. (*n*) and (*o*), of the Hague Rules,[1] which compulsorily applied, as under the rules no such acknowledgment was required; and in so far as the clause, on its true construction, relieved the carrier from liability for delivery of the goods if they were not marked in accordance with its terms, even if adequately marked by other means, it lessened the carrier's liability otherwise than as provided by the Hague Rules and to that extent was null and void under article II, rule 8. Accordingly, the plaintiffs, by presenting the documents specified in the letter of credit, had complied with its terms and were entitled to succeed.

Walters v. *Joseph Rank Ltd.* (1923) 39 T.L.R. 255; *Studebaker Distributors Ltd.* v. *Charlton Steam Shipping Co. Ltd.* [1938] 1 K.B. 459; 54 T.L.R. 77; [1937] 4 All E.R. 304; *Holland Colombo Trading Society Ltd.* v. *Segu Mohamed Khaja Alawdeen* [1954] 2 Lloyd's Rep. 45 applied.

ACTION.

On November 6, 1957, the defendants, the Midland Bank Ltd., wrote to the plaintiffs, British Imex Industries Ltd., in the following terms: "Advice of Arab Bank Ltd. Irrevocable "Credit. We have to inform you that we have received advice "from the Arab Bank Ltd., Amman, that they have opened "with us their irrevocable credit in favour of yourselves on "account of Hamzeh Malass and Sons, Amman, to the extent

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[1] The Hague Rules, art. IV, r. 2: "Neither the carrier nor the ship "shall be responsible for loss or "damage arising or resulting from— ". . . (*n*) Insufficiency of packing: "(*o*) Insufficiency or inadequacy of "marks: . . ."

"of £23,000 valid at this office until November 30, 1957, and "available by your drafts at sight accompanied by triplicated "commercial invoice, original certified by chamber of commerce ". . . shipped bills of lading in complete set issued to order and "blank endorsed 'Aqaba, Jordan' evidencing current shipment "by the s.s./m.v. latest 30.11.1957 from any European port ". . . transhipment prohibited . . . to Aqaba in one of several "shipments of the undermentioned goods: about 520 long tons "reinforcing steel bars . . . at £42 17s. 6d. per long ton basic ". . . C & F Aqaba." The letter added that the defendants were requested to advise the plaintiffs of the terms of the credit which was irrevocable on the part of the Arab Bank Ltd., Amman, but they were not asked to add their confirmation and therefore the advice was given for the plaintiffs' guidance only, and did not involve any undertaking on the defendants' part. On November 13, 1957, the defendants wrote again to the plaintiffs advising them of certain alterations in the credit, namely, "Validity "extended until December 10, 1957. (The latest date for shipment remains unchanged.)" In that letter they stated "this "credit now bears our confirmation, and we hereby undertake to "honour all drafts on presentation provided they are drawn and "presented in accordance with the terms of the credit. It is a "condition of this amendment that our confirmation commission "amounting to £18 is for your account. We understand . . . "that you agree to pay this commission, and we await your "remittance in due course. All other conditions of this credit "remain unchanged." The plaintiffs confirmed that they were willing to pay the commission and paid it, and accordingly the defendants became liable to pay the plaintiffs in accordance with the terms of the credit.

On November 27, 1957, the goods were shipped from Antwerp under bills of lading of the "Hansa" lines. Each bill of lading provided on its face "Shipped at Antwerp in apparent good order "and condition, weight, measure, marks, numbers, quality, "contents and value unknown, by the British Imex Industries, "London, on board the good vessel called the *Nordstern* for "carriage to Aqaba." The marks, number of packages, description of packages and goods, and the approximate gross weights were also given, and "Freight to be prepaid" was written across the face of the bills. The printed clauses and conditions on the back of each bill included, inter alia, clause 2, the paramount clause, which provided that the Hague Rules contained in the International Convention for the unification of certain rules relating to bills of lading, dated Brussels, August 25, 1924, as enacted in the country of shipment should apply to the contract. There were a number of additional printed clauses, one of which, additional clause B, related to iron and steel, angles, bars, channels, etc., and provided as follows: "Vessel not responsible "for correct delivery and all expenses incurred at port of dis"charge consequent upon insufficient securing or marking will be "payable by consignees unless (a) every piece is distinctly and "permanently marked with oil paint; (b) every bundle is securely "fastened, distinctly and permanently marked with oil paint and "metal tagged, so that each piece or bundle can be distinguished "at port of discharge."

On December 10, 1957, the plaintiffs presented to the defendants all the documents referred to in the letter of credit together with sight drafts amounting to £21,468, but the defendants refused to pay the sum claimed on the ground that the bills of lading contained no evidence that the requirements of additional clause B on the back of the bills of lading had been complied with.

On December 11, 1957, the plaintiffs issued the writ in this action, claiming from the defendants the sum of £21,468, damages and interest. They alleged a breach by the defendants of the letter of credit dated November 6, 1957 (as altered by the letter of November 13, 1957). On the day that the writ was issued the action was transferred to the commercial court by Ashworth J., who made an order for it to be tried without pleadings. The defendants, in a letter to the plaintiffs of December 13, 1957, stated that as the bills of lading contained no acknowledgment that the conditions of additional clause B on the back of each bill had been performed, they were not good tender under the letter of credit. The case came on for hearing on December 19, 1957.

A. A. Mocatta Q.C. and *Mark Littman* for the plaintiffs. The bank's contention that these bills of lading were bad tender under this letter of credit is ill-founded. (1) The credit expressly provides for bills of lading to be of a certain type, namely, shipped, complete set, evidencing shipment not later than December, 1957, from a European port. Not only did the bills presented comply with those express conditions but they contained nothing contrary thereto. Accordingly, the plaintiffs had complied with their obligations and were entitled to be paid. By failing to accept the bills of lading the bank acted in breach of its obligations towards the plaintiffs. (2) If the obligation of a beneficiary under an

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irrevocable credit goes further than to tender bills of lading which comply strictly with the terms of the credit, then, on the authorities, that obligation goes no further than to tender bills of lading in a form usual in the trade. These bills of lading were in the usual form. (3) If, contrary to that submission, the obligation is to tender "clean" bills of lading, then these were clean bills of lading, as they contained no words or clausing on their face qualifying the good order and condition of the goods. (4) If those submissions are not acceptable, then additional clause B, on which the bank relies, is invalid by virtue of article III, rule 8, of the Hague Rules, because it goes beyond the provisions of article IV, rule 2, paragraphs (*n*) and (*o*), and therefore the plaintiffs' failure to comply with its terms affords no ground for the bank's refusal to pay.

(1) It is well established that the opening of an irrevocable credit with a bank in favour of a seller under a c.i.f. contract makes a contract between the bank and the seller: *Urquhart, Lindsay & Co.* v. *Eastern Bank Ltd.*[2] As regards the contents of the bills of lading tendered, they must comply strictly with the terms of the credit but there is no clear authority as to what else they must contain. For the law on this subject, see Halsbury's Laws of England, 3rd ed., vol. 2, p. 217, and Gutteridge and Megrah, The Law of Bankers' Commercial Credits, 2nd ed. (1955), pp. 63–84. In practice the bank looks only at the face of the bills of lading and, provided there is nothing on the face of them inconsistent with the terms of the letter of credit, the bank must pay. It is not for the bank to go through the myriad of printed conditions on the back of the bills of lading to see whether they have been complied with. In so far as a contrary view is expressed in Gutteridge and Megrah, p. 80, it is wrong.

(2) It cannot be contested that under a c.i.f. contract the obligation on a seller is to present bills of lading in the form usual in the trade: Scrutton on Charterparties, 16th ed., p. 199. That must also be the obligation under a letter of credit unless otherwise expressly stated. These bills of lading were in the usual form. There is evidence that bills containing a clause in terms identical with additional clause B were accepted a week previously.

(3) There is no authority for the proposition in Gutteridge and Megrah, p. 76, that to be good tender under a letter of credit a bill of lading must be "clean." None of the discussion on the

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[2] [1922] 1 K.B. 318.

subject which appears in the current edition appeared in the first: see Gutteridge, The Law of Bankers' Commercial Credits, 1st ed., Chap. V, p. 54. The view expressed in Davies, The Law Relating to Commercial Letters of Credit, 2nd ed. (1956), p. 130, is that the question is still open. In *National Bank of Egypt* v. *Hannevig's Bank*,[3] where a letter of credit stipulated for payment against "bills of lading," Bailhache J. took the view that "bills "of lading" as there used meant "clean" bills of lading. In the Court of Appeal it was found unnecessary to decide the point, but Scrutton L.J. said[4] that a credit against delivery of bills of lading was not necessarily a credit against clean bills of lading. It depended on the facts of the case.

[Salmon J. Bankes L.J.[5] appeared to take the view that the facts in that case were unusual. Had it not been wartime, the words might well have meant "clean" bills of lading. The observations of Scrutton L.J.[6] do not appear to be germaine to the decision in the case.]

Admittedly the observations of Scrutton L.J.[6] are obiter, but they are of considerable authority. The question also arose in *Westminster Bank Ltd.* v. *Banca Nazionale di Credito*,[7] but was again not decided. The whole tenor of the judgment of Roche J.[8] is in favour of the plaintiffs here. [Reference was also made to *Canada and Dominion Sugar Co. Ltd.* v. *Canadian National* (*West Indies*) *Steamships Ltd.*[9]]

If it be right that the bills of lading must be "clean," then clearly these were clean bills of lading: see the definition in Halsbury, vol. 2, p. 218. There was nothing in them to suggest that there was anything wrong with the goods or that they were not properly packed or marked. It is only when there is some wording or clausing superimposed on the bill of lading drawing attention to the fact that it is unclean which gives ground for their rejection as unclean bills.

Finally, these bills of lading incorporate the Hague Rules. It is admitted that they apply to this particular transaction as the goods were shipped from Amsterdam. If it is the duty of the bank to consider the printed clauses on the back of the bills of lading, then it is also its duty to familiarize itself with the Hague Rules, the provisions of which are paramount over the printed clauses. As to the provisions of the Hague Rules in relation to packing and marking, see article IV, rule 2, paragraphs (*n*) and (*o*), and Scrutton on Charterparties, 16th ed., pp. 483–485. Under the Rules no acknowledgment that the provisions of article IV, rule 2, have been complied with is required, and, therefore, if the provisions of additional clause B go no further than the provisions of the rule, no acknowledgment can be necessary. If additional clause B does go further than article IV, rule 2, by lessening the liability of the carrier other than as provided therein, it is struck at by article III, rule 8, and is void: see Scrutton, 16th ed., p. 479, and *Holland Colombo Trading Society Ltd.* v. *Segu Mohamed Khaja Alawdeen.*[10] It is submitted that it does go further than article IV, rule 2, and accordingly the bank is not entitled to rely on it, and the plaintiffs are entitled to succeed. [Reference was also made to *Sandeman & Sons* v. *Tyzack and Branfoot Steamship Co. Ltd.*[11]]

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[3] (1919) 1 Ll.L.Rep. 69.

[4] See report in Legal Decisions Affecting Bankers, vol. 3, pp. 213, 214.

[5] 1 Ll.L.Rep. 69, 70.

[6] Legal Decisions Affecting Bankers, vol. 3, pp. 213, 214.

[7] (1928) 31 Ll.L.Rep. 306.

[8] Ibid. 309.

[9] [1947] A.C. 46.

Maurice Lyell Q.C. and *H. A. P. Fisher* for the defendant bank. With regard to the plaintiffs' final submission as to the validity of additional clause B under the Hague Rules, it is submitted that there is nothing in the Rules to prevent parties agreeing between themselves what should be sufficient in the way of marks. Indeed, the words of article III, rule 8, are entirely consistent with a statement by the parties of the leading marks necessary for identification of the goods. The carrier is entitled to say that he will not be responsible for delivery of the goods if the agreed marks are not on them or have disappeared.

As to the right of the bank to reject the bills of lading, the real question is whether the bills of lading would be good tender under a c.i.f. contract. For that to be so, there must be nothing in the bill of lading which casts a reasonable doubt that the transaction is going to result in what the parties intended: see *Biddell Bros.* v. *E. Clemens Horst Co.*,[12] *per* Kennedy L.J.,[13] who refers in his judgment to *Sanders Bros.* v. *Maclean & Co.*,[14] *per* Bowen L.J.[15] The bill of lading represents the goods and delivery of it is intended to be delivery of the goods to the purchaser. A bill of lading which does not give the buyer a right to get the goods on their arrival is not good tender. All that the banker is charged to do when the documents are presented to him, apart from seeing that they comply with any special terms of the credit, is to ensure that there is nothing which casts a reasonable doubt in his mind or which puts him on inquiry. [Reference was made to *Westminster Bank Ltd.* v. *Banca Nazionale di Credito.*[16]]

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[10] [1954] 2 Lloyd's Rep. 45.

[11] [1913] A.C. 680; 29 T.L.R. 694.

[12] [1911] 1 K.B. 934.

[13] Ibid. 957.

[14] (1883) 11 Q.B.D. 327.

[15] Ibid. 341.

Additional clause B in these bills of lading is a clause of a special kind dealing with a special class of goods. Where there is a particular condition of this kind in a bill of lading it is for the party who is seeking to sell the bill for money to show that the condition has been complied with. It is the duty of the banker to say that unless a bill is presented which leaves no doubt that the particular condition has been fulfilled he is not bound to take it. It is entirely for the person presenting the bill to cure the doubt by obtaining a statement from the carrier that it has been complied with. Such a statement would bind the carrier against the bank or any assignee of the bill. This is not a point which the bank has taken lightly. The documents were presented and rejected on a number of occasions. The plaintiffs could have taken appropriate steps but failed to do so.

Section 32 of the Sale of Goods Act, 1893, sets out the requisites in a contract of affreightment. They must be reasonable having regard to the nature of the goods and the other circumstances of the case. If it is reasonable to enter into a contract upon the basis of a bill of lading which contains a clause such as additional clause B, it is essential to see that those conditions are complied with. The whole question here is whether the failure to put upon the face of the bills a statement that the goods were packed and marked in accordance with the terms of additional clause B is a defect of moment. It is submitted that the omission so to do amounted to a serious defect and, accordingly, the bank was entitled to reject them.

Mocatta Q.C., in reply, referred to *Australasian United Steam Navigation Co. Ltd.* v. *Hunt*[17] and *Studebaker Distributors Ltd.* v. *Charlton Steam Shipping Co. Ltd.*[18]

[Salmon J. I have come to the clear conclusion in this case that the plaintiffs succeed. I will state my reasons tomorrow morning.]

Salmon J. The writ in this action was issued on Wednesday of last week. The action came on for hearing yesterday, and judgment is now being delivered just 11 days after the issue of the writ. This case illustrates very well the speed and convenience with which the commercial community can have its disputes determined in this court when it chooses to resort to it.

[16] 31 Ll.L.Rep. 306.

[17] [1921] 2 A.C. 351.

[18] [1938] 1 K.B. 459; 54 T.L.R. 77; [1937] 4 All E.R. 304.

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Salmon J.

[His Lordship stated the facts and continued:] It is to be observed that the only remuneration that the bank received was £18. The £23,000 referred to in the credit would have to be paid to the plaintiffs if they complied with the terms of the credit, or, if they did not, presumably would be repaid to the Arab Bank, or to Hamzeh Malass & Sons at Amman. If, as seems not unlikely, the bank's customers took the point that the bank was not entitled to pay on this credit, it is perhaps not at all surprising that the bank would feel obliged, for its own protection, to resist the plaintiffs' claim so that it should be protected by an order of this court.

The point raised in this case is both novel and important, namely: Is it necessary for bills of lading in this form to contain an acknowledgment that the printed terms as to marking and securing have been complied with, or is the bill of lading acceptable so long as it contains no endorsement or clausing to the effect that this printed clause has not been complied with?

The plaintiffs have called before me a witness of the widest experience in the exporting and importing business, including the exporting and importing of iron and steel. I understand that he has 30 years' experience; that he is on the council of the London Chamber of Commerce; that he is deputy chairman of its exporting and importing section, and on the trade terms committee. He said that a clause in similar terms to additional clause B is not unusual in bills of lading. A great many bills of lading contain no such clause, but a great many bills of lading do contain such a clause. He had never heard of a bill of lading containing the clause in question being objected to on the ground that it did not contain a statement that such clause had been complied with. In his experience such bills of lading were invariably accepted as good without such a statement. Indeed, there has been produced to me such a bill of lading accepted by the defendant bank itself without any such acknowledgment as it is now argued is indispensable; but it may be that in that particular case there were special circumstances. The evidence of the plaintiffs' witness was wholly uncontradicted and not very seriously challenged. I unhesitatingly accept it.

It follows that if the bank is right in its present contention, it will be necessary for those concerned with the exporting and importing of iron and steel to revolutionize their present practice when using bills of lading which contain a clause similar to additional clause B. There may also be a good many disappointed sellers of iron and steel who have already parted with their goods on the faith of confirmed irrevocable credits, relying on the practice of banks to accept bills of lading in this form, that is to say, without any express statement that the terms relating to marking and securing of the goods have been complied with.

The letter of credit stipulated that payment would be made against bills of lading without qualification. The plaintiffs suggest that this does not necessarily mean clean bills of lading. In my judgment, when a credit calls for bills of lading, in normal circumstances it means clean bills of lading. I think that in normal circumstances the ordinary business man who undertakes to pay against the presentation of bills of lading means clean bills of lading; and he would probably consider that that was so obvious to any other business man that it was hardly necessary to state it. That seems to have been the view taken by Bailhache J. in *National Bank of Egypt* v. *Hannevig's Bank.*[1] I entirely agree with it. No doubt, as was pointed out by the Court of Appeal in that case,[2] there may be circumstances when, for instance, business has been disorganized by war, in which a credit against bills of lading is not necessarily a credit against clean bills of lading. That is a point which it is unnecessary to decide in this case, for here there are no special circumstances, and I read "bills of lading" in the letter of credit as meaning clean bills of lading. A "clean bill of lading" has never been exhaustively defined, and I certainly do not propose to attempt that task now. I incline to the view, however, that a clean bill of lading is one that does not contain any reservation as to the apparent good order or condition of the goods or the packing. In my judgment, the bills of lading in this case are plainly clean bills of lading. They contain no reservation by way of endorsement, clausing or otherwise, to suggest that the goods or the packing are or may be defective in any respect.

The defendant bank contends that inasmuch as the bills of lading do not contain on their face an express acknowledgment that the goods have been marked in accordance with the provisions of additional clause B, then either they are not clean bills of lading—I have dealt with that point—or they are so seriously defective that the bank is entitled to refuse payment. It is to be observed that the letter of credit did not call for bills of lading to be endorsed with any acknowledgment that the provisions of the additional clause B had been complied with. I do not consider that the bank has any right to insist on such an acknowledgment before payment. According to their case, it was their duty for the remuneration of £18 to read through the multifarious clauses in minute print on the back of these bills of lading and, having observed additional clause B, to consider its legal effect and then to call for an acknowledgment that it had been complied with. I respectfully share the doubt that Scrutton L.J. expressed in *National Bank of Egypt* v. *Hannevig's Bank*[3] as to whether any such duty is cast upon the bank. I doubt whether banks are under any greater duty to their correspondents than to satisfy themselves that the correct documents are presented to them, and that the bills of lading bear no indorsement or clausing by the shipowners or shippers which could reasonably mean that there was, or might be, some defect in the goods or their packing.

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[1] (1919) 1 Ll.L.Rep. 69.

[2] Ibid. 70.

Assuming, however, that the bank is concerned with the clauses printed on the back of the bill of lading and their legal implications, clause B does not, in my judgment, require the bill of lading to contain an acknowledgment by the shipowner that it has been complied with. This shipment being from Antwerp, the Hague Rules are compulsorily applied to it. Article IV, rule 2, of the Hague Rules provides: "Neither the carrier nor the ship "shall be responsible for loss or damage arising or resulting from— ". . . (*n*) Insufficiency of packing: (*o*) Insufficiency or inadequacy "of marks: . . ." It has never heretofore been suggested (and, indeed, the defendant bank does not now suggest) that whenever these provisions of the Hague Rules are impliedly written into a bill of lading, the bill of lading should contain some acknowledgment that the goods have been sufficiently packed and adequately marked.

The plaintiffs contend that (1) if the additional clause B goes no further than article IV, rule 2, paragraphs (*n*) and (*o*), of the Hague Rules, it cannot be necessary for the bill of lading to contain any acknowledgment that the clause has been complied with; and (2) if the clause goes further than article IV, rule 2, paragraphs (*n*) and (*o*), and lessens the liability of the carrier and the vessel otherwise than as provided in the rules, then it is null and void under article III, rule 8, which reads as follows: "Any "clause, covenant or agreement in a contract of carriage relieving "the carrier or the ship from liability for loss or damage to or "in connexion with goods arising from negligence, fault or failure "in the duties and obligations provided in this article or lessening "such liability otherwise than as provided in these rules, shall "be null and void and of no effect."

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[3] See report in Institute of Bankers: Legal Decisions Affecting Bankers, vol. 3, pp. 213, 214.

These contentions of the plaintiffs are, in my judgment, sound. Additional clause B is perhaps not very felicitously drafted. Counsel for the defendant bank, however, concedes, rightly in my view, that it does go further than article IV, rule 2, paragraphs (*n*) and (*o*). He says that, on its true construction, it means that the vessel is not liable for delivery unless every piece is distinctly and permanently marked with oil paint, and every bundle is securely fastened, distinctly and permanently marked with oil paint and with metal tag, so that each piece or bundle can be distinguished at the port of discharge. He has to concede that, even if the goods are adequately marked, by branding for example, yet if they were not marked with oil paint, the vessel would not be liable for delivery. It may be that the parties can agree what shall be deemed to be adequate marking. In my judgment, however, it is not open to the parties to agree that the goods shall be deemed in certain circumstances to be inadequately marked so as to relieve the vessel or the shippers from liability on that account if in fact and in truth the goods are adequately marked: see *Walters* v. *Joseph Rank Ltd.*,[4] *Studebaker Distributors Ltd.* v. *Charlton Steam Shipping Co. Ltd.*[5] and *Holland Colombo Trading Society Ltd.* v. *Segu Mohamed Khaja Alawdeen.*[6] Accordingly, in so far as additional clause B goes beyond article IV, rule 2, paragraphs (*n*) and (*o*), of the Hague Rules, it is null and void.

For these reasons, I have come to the conclusion that the plaintiffs have complied with their obligations under the confirmed irrevocable credit, and that the bills of lading in cases such as these need contain no express statement or acknowledgment that the printed clause dealing with marking or securing the goods has been complied with. Accordingly, in my judgment, the plaintiffs are entitled to succeed in this action, and I give judgment for them for the sum of £21,468 0s. 8d.

Judgment for plaintiffs.

Solicitors: *Menasse & Tobin; Coward, Chance & Co.*

E. M. W.

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[4] (1923) 39 T.L.R. 255.

[5] [1938] 1 K.B. 459; 54 T.L.R. 77; [1937] 4 All E.R. 304.

[6] [1954] 2 Lloyd's Rep. 45.

C. A.

1957
Dec. 9, 10, 11, 12;

1958
Feb. 7.

Lord Denning, Hodson and Morris L.JJ.

PYX GRANITE CO. LTD. *v.* MINISTRY OF HOUSING AND LOCAL GOVERNMENT AND ANOTHER.

[1954 P. No. 3415.]

Town and Country Planning—Development—"Authorized by Act"—Private Act enacting that heads of agreement between parties "are "hereby confirmed and made binding" on parties—Whether provisions binding as a contract or as a statute—Whether permission required—Quarrying—Permission granted subject to conditions imposed by Minister—Whether conditions related to permitted development valid without provision for compensation—Malvern Hills Act, 1924 (14 *&* 15 *Geo.* 5, *c. xxxvi*), *s.* 54, *Sch.* 4—*Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 14, 15, 17, 26, 27—*Town and Country Planning General Development Order,* 1950 (*S.I.* 1950, *No.* 728), *arts.* 3 (1), 4 (1), *Sch. I, Class XII.*

Town and Country Planning—Development—Conditions—Validity.

Practice and Procedure—Declaratory judgment—Town and Country Planning—Development—Declaration—Whether jurisdiction to grant declarations ousted by statute—Town and Country Planning Act, 1947, *ss.* 14, 15, 17.

Statute—Construction—Jurisdiction of High Court—Not to be taken away save by clear words.

Crown Practice—Certiorari—Inferior tribunal—Minister—Town and Country Planning—Development—Validity of conditions—Whether certiorari will lie—Town and County Planning Act, 1947, *s.* 14.

A private Act of Parliament, the Malvern Hills Act, 1924, promoted to preserve the amenities of the hills against depredations by quarrying, provided by section 54[1] that "for the protection" of the plaintiff company (which carried on extensive quarrying operations in the area affected by the Act, both on their own freehold and over licensed land) "the following provisions shall unless "otherwise agreed in writing between the company the Conser"vators and the Malvern Council have effect (that is to say):—"The heads of agreement as set forth in the Fourth Schedule to "this Act are hereby confirmed and made binding" on the parties "and the provisions of this Act shall only apply to and affect the "undertaking, property or rights of the company subject to the "provisions of the said heads of agreement."

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[1] Malvern Hills Act, 1924, s. 54: "For the protection of the Pyx "Granite Company Limited (in this "section referred to as 'the com"'pany') the following provisions "shall unless otherwise agreed in "writing between the company and "the Conservators and the Malvern "Council have effect (that is to say):—"The heads of agreement as set forth "in the Fourth Schedule to this Act "are hereby confirmed and made "binding on the company and the "Conservators and the Malvern "Council and the provisions of this "Act shall only apply to or affect "the undertaking property or rights "of the company subject to the "provisions of the said heads of "agreement."

The heads of agreement were incorporated, with some variation, in a deed executed in December, 1925, after the passing of the Act. Under the deed the company gave up their rights to quarry many acres of the licensed land in return for a promise by the conservators that the company's rights to quarry on their freehold land and on some 23 acres of licensed land should remain undisturbed.

The Town and Country Planning General Development Order, 1950,[2] made under the Town and Country Planning Act, 1947, provides, so far as material (by article 3 (1) read with Class XII of the First Schedule to the Order), that "development authorized "by any local or private Act of Parliament" may be undertaken without permission.

By these proceedings the company claimed declarations that the development which they proposed to carry out on their freehold and licensed land was "authorized" by the Malvern Hills Act, 1924, and that accordingly two ministerial decisions, in 1949 and 1953, refusing them permission in respect of part of their proposed development and granting permission subject to certain conditions in relation to other parts of their operations were of no effect; and, further, that the conditions imposed by the Minister, exercising his powers under section 14 of the Act of 1947,[3] were invalid, as restrictions on the continuance of an existing use which could be imposed only under section 26 of the Act of 1947 with compensation as provided by section 27 of that Act.

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[2] Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950 (S.I. 1950, No. 728), Article 3: "(1) Subject to the subsequent provisions of this Order, "development of any class specified "in the First Schedule to this Order "is permitted by this Order and may "be undertaken upon land to which "this Order applies, without the "permission of the local planning "authority or the Minister: . . ." Sch. I, Pt. I, Class XII: "Development authorized by any local or "private Act of Parliament or by any "Order approved by both Houses of "Parliament, being an Act or Order "which designates specifically both "the nature of the development thereby authorized and the land upon "which it may be carried out; . . ."

[3] Town and Country Planning Act, 1947, s. 14: "(1) Subject to the "provisions of this and the next "following section, where application "is made to the local planning "authority for permission to develop "land, that authority may grant permission either unconditionally or "subject to such conditions as they "think fit, or may refuse permission; "and in dealing with any such application the local planning authority "shall have regard to the provisions "of the development plan, so far as "material thereto, and to any other "material considerations. (2) Without "prejudice to the generality of the "foregoing subsection, conditions may "be imposed on the grant of permission to develop land thereunder— "(*a*) for regulating the development "or use of any land under the control "of the applicant (whether or not it "is land in respect of which the "application was made) or requiring "the carrying out of works on any "such land, so far as appears to the "local planning authority to be expedient for the purposes of or in "connexion with the development "authorized by the permission; (*b*) "for requiring the removal of any "buildings or works authorized by "the permission, or the discontinuance of any use of land so authorized, at the expiration of a specified "period, and the carrying out of any "works required for the re-instatement of land at the expiration of "that period; and any permission "granted subject to any such condition as is mentioned in paragraph

The defendants raised preliminary objections that the court had no jurisdiction to grant the declarations asked for, since (a) by the combined effect of sections 15 and 17 of the Act of 1947[3] the decision of the Minister on an application to determine whether permission was required "shall be final" and the only method of determining such a question was that provided by section 17 (1) (whereby a person "may . . . apply" to the local authority to determine it); and (b) the wide discretion conferred by section 14 on the Minister to impose conditions disentitled the company from coming to the court for a declaration that the conditions were invalid:—

Held, (1) (Hodson L.J. dissenting) that nothing in section 17 or in the Act excluded the jurisdiction of the court to grant

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"(b) of this subsection is in this Act "referred to as permission granted "for a limited period only."

S. 15: "(1) The Minister may give "directions to any local planning "authority . . . requiring that any "application for permission to develop "land, or all such applications of "any class specified in the directions, "shall be referred to the Minister "instead of being dealt with by the "local planning authority, and any "such application shall be so referred "accordingly. (2) Where an application for permission to develop "land is referred to the Minister "under this section, the provisions "of subsections (1) and (2) of the "last foregoing section shall apply ". . . in relation to the determination of the application by the "Minister as they apply in relation "to the determination of such an "application by the local planning "authority: Provided that before "determining any such application "the Minister shall, if either the "applicant or the local planning "authority so desire, afford to each "of them an opportunity of appearing before and being heard by a "person appointed by the Minister "for the purpose. (3) The decision "of the Minister on any application "referred to him under this section "shall be final."

S. 17: "(1) If any person who "proposes to carry out any operations "on land or make any change in the "use of land wishes to have it "determined whether the carrying out "of those operations or the making "of that change in the use of the "land, would constitute or involve "development of the land within the "meaning of this Act, and, if so, "whether an application for permission in respect thereof is required "under this Part of this Act . . . he "may, either as part of an application for such permission, or without "any such application, apply to the "local planning authority to determine that question. (2) The foregoing provisions of this Part of this "Act shall . . . apply in relation to "any application under this section "and to the determination thereof "as they apply in relation to applications for permission to develop land "and to the determination of such "applications: Provided that where it "is decided by the Minister under "any of the said provisions that any "operations or use to which an application under this section relates "would constitute or involve development of the land, or that an application for permission is required as "aforesaid in respect thereof, that "decision shall not be final for the "purposes of any appeal to the court "under the provisions of this Part of "this Act relating to the enforcement "of planning control, in relation to "those operations or that use."

declarations; and section 17 did no more than provide an optional method of having the question determined by the Minister.

Barraclough v. *Brown* [1897] A.C. 615; 13 T.L.R. 527 distinguished.

Decision of McNair J. in *Francis* v. *Yiewsley and West Drayton Urban District Council* [1957] 2 Q.B. 136; [1957] 1 All E.R. 825 applied.

Per Hodson L.J. Planning is the creature of statute, and Parliament has provided its own method for the determination of the question here involved, giving by section 17 exclusive jurisdiction to the local authority and the Minister; this court, cannot, therefore, be asked to make the declaration sought. No significance is to be attached to the use of the word "may"; the same permissive word "may" was contained in the statute under consideration in *Barraclough* v. *Brown* (supra).

(2) (Morris L.J. dissenting) that the company required permission, for the development was not "authorized" by the Malvern Hills Act, 1924, but by the subsequent agreement of December, 1925. Authorization by Act of Parliament involves the need for sanction, and the Act of 1924 did not authorize the company to do anything. The effect of section 54 of that Act was to make the provisions of the heads of agreement as binding as a contract, not as binding as a statute.

Reg. v. *Midland Railway Co.* (1887) 19 Q.B.D. 540 applied.

Per Morris L.J. Parliament, by section 54 of the Act of 1924, gave formal approval and sanction to the activities of the company, and thereby "authorized" a piece of elaborate and detailed planning which constituted development.

(3) That the conditions imposed by the Minister were valid as being fairly and reasonably related to the permitted development.

Per Lord Denning. Remedy by declaration was clearly available on this issue. It was probable, though not certain, that certiorari would have lain.

Per Hodson L.J. It was doubtful whether the Minister's decision on this issue could properly be impeached by declaration. That could have been done by certiorari.

Rex v. *Hendon Rural District Council, Ex parte Chorley* [1933] 2 K.B. 696; 49 T.L.R. 482 considered.

Decision of Lloyd-Jacob J. reversed.

Appeal from Lloyd-Jacob J. (sitting as an additional judge of the Queen's Bench Division).

The facts, in chronological order, were as follows: In 1924 a private and local Act of Parliament, the Malvern Hills Act, 1924, was promoted on a bill by the Malvern Hills Conservators, a body constituted and incorporated under earlier private Acts, to obtain greater powers to preserve the amenities of a place of great natural beauty. The preamble to the Act stated that "whereas in recent years the amenities of the Malvern Hills "have been seriously interfered with by quarrying operations "and by the erection of buildings sheds machinery and plant "and their operations are being extended in such manner as to "threaten to destroy the value of the Malvern Hills as objects "of public interest" the conservators asked for further powers of "protecting controlling and dealing with" the hills.

The Bill was opposed on its passage through Parliament by, inter alia, the plaintiff company, Pyx Granite Company Ltd., an existing quarry undertaking with extensive vested interests in the area concerned. They were the owners in fee simple at all material times of 11 acres of the land (the "Tank Quarry"), five acres of which have never yet been quarried and contain stone sufficient to last 100 years; and they also had various licences to work other extensive quarryable areas. Negotiations took place during the passage of the Bill with various interested parties, and by sections 26 and 27 of the Act, Parliament empowered the Minister of Health, on the application of the conservators, to make orders prohibiting quarrying on any particular part of the Hills, but provided that the conservators should pay compensation to the owners affected by such orders.

The particular negotiations between the plaintiff company, the conservators and the Malvern Council resulted in extremely detailed "heads of agreement" being drawn up and set out in the Fourth Schedule to the Act, and by section 54 of the Act [1] were "hereby confirmed and made binding" on the parties.

The heads of agreement contemplated that a formal agreement would be executed; and after some differences between the parties, which were only resolved after a decision of the Court of Appeal on June 24, 1925, a deed was executed on December 14, 1925, by the Malvern Council, the conservators, and the company, under which the company gave up their right to quarry on a considerable area of land in return for a promise by the conservators that the company's rights to quarry on their freehold property (the Tank Quarry) should not be prejudiced or affected by the deed and that the company should have the right to quarry on some 23 acres of land licensed to them by the council.

On November 17, 1947, before the coming into force of the Town and Country Planning Act, 1947, the company applied to the Malvern Council for permission to develop the land for quarrying purposes. The provisions of the Town and Country Planning, England and Wales Interim Development Order (S.R. & O., 1946, No. 1621), made under the Town and Country Planning Acts, 1932 to 1944, were then in operation; and on

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[1] See footnote on p. 554.

January 14, 1948, the Minister of Town and Country Planning "called in" the company's application for decision. When he dealt with it, he did so under the provisions of the Town and Country Planning Act, 1947, which came into operation on July 1, 1948; and by a letter on September 5, 1949, the Minister granted the company permission to win and work the minimum amount of granite required to ensure safety on the North Quarry part of the licensed lands by removal of a sufficient weight of rock to secure stabilization of a threatened slip, and to leave a trimmed face at a safe angle of repose, subject to three conditions.

In July, 1952, a public local inquiry was held by the Minister to inquire into the various applications for quarrying in the Malvern Hills. At the inquiry the plaintiff company informed the Minister that their quarrying operations were "development" within the meaning of the Act of 1947, which was permitted unconditionally by virtue of section 54 of the Malvern Hills Act, 1924, as "development authorized by any local or private Act "of Parliament . . ." falling within the provisions of article 3 and Class XII of the First Schedule to the Town and Country Planning General Development Order 1950[2] (which revoked and replaced by identical provisions so far as material the Town and Country Planning (General Development) Order, 1948 (S.I. 1948, No. 958)). The company accordingly invited a dismissal of their application by the Minister on the ground that no development permission was required.

By a letter dated September 30, 1953, the Minister stated that he was advised that notwithstanding the provisions of the Malvern Hills Act, 1924, and of the Order of 1950, permission was required by the company for the continuance of the operations in question and that he must deal with the application on its merits. He refused the company permission to win and work granite in respect of parts of the company's freehold land because he wished to preserve the skyline; and he also refused permission to work a spur of the licensed land because it screened the workings. He granted permission to win and work granite in a defined part of the freehold land until June 30, 1966, subject to conditions, which, so far as relevant, were (1) that crushing and screening should only be operated between such hours as might be agreed, and that steps should be taken to control the emission of dust therefrom, and (2) that all plant, machinery and foundations should be removed when they were no longer required, and that the site be left in a tidy condition.

[2] See footnote on p. 555.

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PYX GRANITE CO. LTD.
v.
MINISTRY OF HOUSING AND LOCAL GOVERNMENT.

On December 21, 1954, the company issued the writ in the present proceedings, claiming declarations (1) that the winning and working of stone by them in certain lands and quarries at Malvern was development within the meaning of the Town and Country Planning Act, 1947, for which there was unconditional planning permission; (2) that the purported decision of September 5, 1949, by the Minister of Town and Country Planning, and the purported decision dated September 30, 1953, by the Minister of Housing and Local Government, were of no effect and invalid and in no way affected the company's rights to win and work pursuant to the said unconditional permission; (3) alternatively, that certain conditions purported to be imposed by the purported decisions of the Minister were of no effect and invalid; and they also asked for an injunction to restrain the Worcestershire County Council (the second defendants) from acting as the local planning authority on the said decisions.

The defendants claimed by the defence, inter alia, on a preliminary objection, that as the combined effect of sections 15 and 17 of the Town and Country Planning Act, 1947,[3] provided statutory procedure for the determination of any question as to whether the carrying out of certain operations on land would constitute or involve development within the meaning of the Act for which permission would be required, and enacted that any decision of the Minister made on an application under section 17 (1) "shall be final," the court had no jurisdiction to grant the declarations asked for. Secondly, they claimed that the development sought by the company was not "authorized" by the Malvern Hills Act, 1924, and accordingly permission was necessary. Thirdly, they claimed that the discretion conferred on the Minister by section 14 (1) and (2) (*a*) entitled him to impose conditions and the company was not therefore entitled to declarations in respect of those conditions.

Lloyd-Jacob J., in his judgment on April 16, 1957, held that he had jurisdiction to grant declarations, and granted declarations in favour of the company accordingly.

The Ministry and the county council appealed.

G. D. Squibb Q.C., *Rodger Winn* and *Andrew Leggatt* for the Ministry and the Worcestershire County Council. First, the first declaration asked for, namely, whether the proposed development is "development" for which the company requires or has permission under the Act of 1947, is precisely the question which section 17 says shall be determined by the local planning authority; and if the Minister " calls in " an application, section 15 (3) provides that his decision " shall be final." Parliament having thereby provided a particular way of having the question determined, the court has no jurisdiction to determine it. The position here is indistinguishable from that in *Barraclough* v. *Brown*[4]; there the words were " may, if they think fit "; here they are " he may . . . apply "; but the House of Lords held that the court's jurisdiction was excluded.

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[3] See footnote on p. 555.

Secondly, the proposed development is not within Class XII of Part I of the First Schedule to the Order of 1950 as " authorized " by any . . . private Act of Parliament." What is envisaged by Class XII is an express authorization of a specific development, and no such authorization can be spelt out of section 54 of the Malvern Hills Act, 1924, or the " heads of agreement " in the Fourth Schedule. An implied authority is not enough, for Class XII is intended to have a very limited effect. The Act of 1924, far from " authorizing " any quarrying at all, cut down the rights to quarry which the company possessed at common law, and section 54 " for the protection " of the company did no more than put the " heads of agreement " in the same position as if they had been executed and sealed by the parties to the agreement; the statutory confirmation merely makes the agreement for the parties. *Reg.* v. *Midland Railway Co.*[5] (not cited to Lloyd-Jacob J.) states the effect of clauses of this kind in a local Act, and that decision should be applied here.

This submission is supported by the decision of the Court of Appeal on June 24, 1925, on the litigation between the parties, before the deed of December, 1925, came into existence, for the effect of that decision is that the company's land was not excluded from the general limitations on quarrying imposed by the Act of 1924.

[Morris L.J. If it is said that the Home Secretary could have made an order the day after the Act came into force which would prohibit the company quarrying on its land, " protection " in section 54 would be a misnomer?]

Yes; the company would be in no better position than any other quarrying undertaker in the area so far as the general provisions of the Act were concerned, but the company had by agreement obtained some contractual rights which they did not have before and were thereby in a better position in that those " heads of agreement " were made binding.

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[4] [1897] A.C. 615; 13 T.L.R. 527.

[5] (1887) 19 Q.B.D. 540.

[Morris L.J. But as the Act is expressed to apply to the company subject to the agreement, does not that mean that development was authorized for the future?]

No. It was merely not stopped.

Thirdly, the Minister could impose conditions under section 14 of the Act of 1947. If a condition was ultra vires, the proper way to attack it was by certiorari and mandamus in time, and not by asking for a declaration long after the time for certiorari has passed. *Barnard* v. *National Dock Labour Board* [6] is distinguishable, for there it was only by declaration that the board's errors could be put right. Though declaration is a convenient remedy it should not be used when justice can be done in some other way. [Short and Mellor's Practice of the Crown Office, 2nd ed., p. 605, and *Rex* v. *Hendon Urban District Council, Ex parte Chorley* [7] were also referred to.]

As to the validity of the conditions, they were properly imposed under the general powers conferred on the Minister by section 14 (1), or alternatively can be justified under section 14 (2) (*a*) as "requiring the carrying out of works" on land under the applicant's control, and it is immaterial whether that land was or was not land in respect of which the application was made, for there is a sufficient nexus here between "winning and "working" of the stone for which permission is sought, and the removal of buildings in which the stone has to be processed. A condition to remove buildings is intra vires: see *per* Lord Normand in *London County Council* v. *Marks & Spencer Ltd.* [8] that "works" includes works of demolition. The conditions imposed fall within "works" in subparagraph (*a*), and that same subparagraph may be used to justify the conditions with regard to blasting, screening, crushing and dust precautions. The Minister has said that he will allow the company to quarry, but that, if they do, they must clear it all away at the end and tidy it up. The conditions were directed to preventing places being left derelict on the Malvern Hills. They were all reasonable as being in connexion with the proposed development and almost incidental to it. They are terms of a compromise and a proper way of dealing with a quarry applicant. The Minister's decision in the case reported in Selected Appeal Decisions Bulletin (VII/12) [9] is distinguishable, for there the old and new factory sites were not connected, and the Minister correctly decided that he should impose conditions under section 26 which attract compensation under section 27 of the Act of 1947. Section 26 and section 14 overlap to some extent.

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[6] [1953] 2 Q.B. 18; [1953] 1 All E.R. 1113.

[7] [1933] 2 K.B. 696; 49 T.L.R. 482.

[8] [1953] A.C. 535, 541; [1953] 1 All E.R. 1095.

[9] Hill's Complete Law of Town and Country Planning (4th ed.), 2nd Cumulative Supplement, pp. 489–490.

J. Ramsay Willis Q.C. and *William Scrivens* for the company. First, despite the similarity of the words in this Act and in the Act considered in *Barraclough* v. *Brown*,[10] the court's jurisdiction is not excluded. The language of section 17 here is permissive and not mandatory. Three conditions must be satisfied before the court's jurisdiction can be said to be excluded: (1) the party must be compelled to resort to the tribunal; (2) it must appear clearly that the legislature has committed to the tribunal exclusive jurisdiction to determine; and (3) it must be clear that the court would be usurping jurisdiction which the legislature has forbidden it to exercise. None of those requirements is satisfied here, and this matter, which is the interpretation of "development authorized by any . . . private Act of Parliament," is essentially a matter for the court. The Act of 1947 was a revolutionary Act which took away rights and imposed charges; it contained new and difficult definitions. The provision in the Act by which the Minister may determine the question is only a convenient alternative to seeking the court's construction. It is clear that section 17 applies only to future development, and since it is clear that under section 23 (4) (*a*) of the Act of 1947 a person, who had carried out development and received an enforcement notice as a result, could on a case stated come to the court for a construction of "development," it would be wholly illogical if a person who sought to discover whether permission was required before carrying out works should be precluded from coming to the court. [*Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*[11] was also referred to.]

Secondly, it is conceded that there is no express authorization of the proposed development in the private Act of 1924, but development of the company's freehold land was inferentially authorized by that Act. In construing the words in Class XII the court should give a wide and benevolent interpretation to "authorized," for the Act of 1947 has the flavour of a penal Act, which by section 118 took away rights which had existed up to that time at common law and under private Acts: see the discussion on "authorize" in *Evans* v. *E. Hulton & Co. Ltd.*[12] Though in *Herron* v. *Rathmines and Rathgar Improvement Commissioners*[13] Lord Halsbury L.C. said that in construing an Act one cannot look at the Bill, it is legitimate to look at the surrounding circumstances and to note that, when this Bill was promoted, the whole of the company's land, including its freehold, was under threat of restriction; and as a result of negotiations there came into being the parliamentary bargain to which effect was given by section 54. That bargain was that as a term of giving up their rights to quarry on other land the company was given public recognition in the statute of the exclusion of their freehold land from the restrictive provisions of the Act. The freehold rights are vital to this company. In *Attorney-General* v. *North Eastern Railway Co.*[14] Phillimore L.J. considered a clause "for the protection of" a company and pointed out the importance of seeing in what the protection really consisted. *Reg.* v. *Midland Railway Co.*[15] is distinguishable, for it dealt simply with the words in a private Act of Parliament.

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[10] [1897] A.C. 615.

[11] [1948] 1 K.B. 223; 63 T.L.R. 623; [1947] 2 All E.R. 680.

Thirdly, the conditions are ultra vires the powers conferred by section 14, for unless a particular condition can be seen clearly to relate to the actual development intended, it cannot be validly imposed under that section. The company did not need planning permission to continue the use of buildings and land, which was an existing use. Additional powers are needed if the Minister is to require pulling down and removing, and the person required to do such acts must be compensated under section 27. "Works" in the planning Acts connote the doing of something positive by way of new works and, unless there is specific reference to "works of demolition," would not include demolition. The conditions, to be valid, must relate specifically and expressly to the development which is permitted. These conditions are neither related to nor connected with the permitted development of "winning and working" the stone.

On the technical objection to the grant of a declaration, certiorari would not have been the appropriate remedy for challenging the validity of these conditions, for the Minister could be said to be acting here in an administrative and not in a judicial or quasi-judicial capacity. The discretionary remedy by declaration is the only suitable remedy here, and it would be a denial of justice if the court concluded that though the conditions were ultra vires the company could not have this remedy, particularly as they are too late for certiorari. The discretion to grant declarations is almost unlimited: compare *Hanson* v. *Radcliffe Urban District Council*[16] and *Ealing Borough Council* v. *Minister of Housing and Local Government.*[17]

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[12] (1924) 131 L.T. 534, 535.

[13] [1892] A.C. 498, 502.

[14] [1915] 1 Ch. 905, 917.

[15] 19 Q.B.D. 540.

Squibb Q.C. replied.

Cur. adv. vult.

Lord Denning. The Malvern Hills are of great natural beauty. They are also an important source of granite for roads. The Pyx Granite Company have the right to quarry in two areas of the Hills. The questions in this case are two: first, whether the company have to obtain the permission of the planning authority before breaking fresh surface; second, if permission is necessary, what conditions can the planning authority lawfully impose?

The Ministry of Housing and Local Government says that the company are not entitled to win and work granite from the Hills except with the special permission of the local planning authority, that is, the Worcestershire County Council, or of the Minister. The Minister is ready to grant permission to the company to quarry to a limited extent, but no more.

There are two quarryable areas concerned. One is the Tank Quarry area. It is the freehold property of the company. It is the most important of the Malvern quarries, and is 11 acres in extent. There are five acres of it not yet touched which contain sufficient stone to last 100 years. The Minister, by a letter dated September 30, 1953, refused permission to work a tract of this land because he wished to preserve the skyline; and he also refused permission to work a spur of the land because it screened the workings. He has granted permission to work the remainder, but only until June 30, 1966.

The other is the North Quarry area. It is owned by the Malvern Council, but they have granted to the company licences to work it until June 24, 1960. It is 23 acres in extent, but is in a dangerous state. There is a fault which has threatened to cause a large fall of rock. The Minister, by a letter dated September 5, 1949, has granted to the company permission to win and work the *minimum* amount of granite required to secure safety, but by the letter of September 30, 1953, he has refused permission for any other working.

The Pyx Granite Company contend that the Minister's letter refusing permission is of no validity at all. They say that they do not require special permission to work these areas because they were authorized to work them by a local or private Act of Parliament, namely, by the Malvern Hills Act, 1924. They say that development so authorized comes within the Town and Country Planning (General Development) Order, 1948 [revoked and replaced by the Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950, para. 3 and Class XII of which are in terms and effect, so far as material, identical with the corresponding provisions of the Order of 1948] which makes special permission unnecessary. The Minister has rejected this contention, and the company now bring this action asking the court to declare that they are in the right about it.

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[16] [1922] 2 Ch. 490; 38 T.L.R. 667.

[17] [1952] Ch. 856; [1952] 2 T.L.R. 490; [1952] 2 All E.R. 639.

Mr. Squibb takes a preliminary objection. He says that the court has no jurisdiction to entertain this claim for a declaration, and he relies on *Barraclough* v. *Brown*[1] for the purpose. The only procedure open to the company is, he says, by application under section 17 of the Town and Country Planning Act, 1947, which provides that "if any person who proposes to carry out "any operations on land . . . wishes to have it determined . . . "whether an application for permission in respect thereof is "required under this Part of this Act having regard to the pro-"visions of the development order, he may . . . apply to the "local planning authority to determine the question."

It is as well to see what the procedure of section 17 entails. Take a company which wants to know whether permission is required for its proposed development. The company can apply to the county council to know whether permission is required or not. If the county council decides that permission is required, the company can appeal to the Minister, or the Minister can "call in" the application to be determined by himself in the first instance. If the Minister decides (either on appeal or at first instance) that permission is required, there is no appeal to the courts from his decision at that stage, but his decision is not final. The company can test the correctness of it in a roundabout way. They can ignore his decision, and carry out their operations without permission; and then, when the county council serve an enforcement notice, the company can appeal to a court of summary jurisdiction and ask for the notice to be quashed on the ground that no permission was required—see section 23 (4) (*a*)—and thence, by applying for a case to be stated, the company can obtain the ruling of the High Court. See what this means. The company would have to do the work at much expense without having any decision of the courts as to their rights, and at the risk of being ordered to pull it down if they were wrong.

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[1] [1897] A.C. 615; 13 T.L.R. 527.

So much for the remedy under section 17. Is it the only remedy? That depends on the true interpretation of the Act. I take it to be settled law that the jurisdiction of the High Court to grant a declaration is not to be taken away except by clear words. In *Barraclough* v. *Brown*[1] the words were sufficiently clear. In that case Parliament had,[2] "by plain implication, "enacted that no other court has any authority to entertain or "decide these matters": see *per* Lord Watson. That is shown by the recent case of *Francis* v. *Yiewsley and West Drayton Urban District Council*,[3] where a man was aggrieved by an enforcement notice served under the Act of 1947. He said it was invalid. The Act gave him a remedy by way of appeal to a court of summary jurisdiction. Section 23 (4) said "he may" appeal. The planning authority argued that that was the only remedy. But McNair J. and this court held that the existence of the statutory remedy did not bar him from seeking a remedy by declaration. McNair J. said[4]: "It is a fundamental rule "that if a subject is to be deprived of a right of coming to these "courts it must be in clear words." I entirely agree.

Applying this principle, I find nothing in the statute to bar recourse to a declaration. Section 17 is, no doubt, a convenient remedy. It enables a ruling to be obtained from the Minister in a way which is simple and inexpensive. But it is not the only remedy. Section 17 says that "he may" apply to the local planning authority, not that he *must* do so. The proposed work may be of such importance that the developer may desire the ruling of the High Court before starting on it. The only means of getting such a ruling is by an action for a declaration, and I see nothing in the Act to bar it. In my opinion, the preliminary objection fails.

I turn, therefore, to the substantial dispute. The company says that the working of these areas is covered by the General Development Order, and does not need the permission of the local planning authority or of the Minister. The General Development Order permits any development to be carried out if it is

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[1] [1897] A.C. 615; 13 T.L.R. 527.

[2] [1897] A.C. 615, 622.

[3] [1957] 2 Q.B. 136; [1957] 1 All E.R. 825 (on appeal ante 478; [1957] 3 All E.R. 529).

[4] [1957] 2 Q.B. 136, 148.

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"development *authorized* by any local or private Act of Parliament . . . being an Act or Order which designates specifically both the nature of the development thereby authorized and the land upon which it may be carried out"; see Article 3 and class XII of the First Schedule to the Order of 1950. The company say that the development of these areas is authorized by the Malvern Hills Act, 1924, but the Minister disputes it.

The dispute depends on the true effect of the Act of 1924. It appears from the recitals that the amenities of the Malvern Hills were threatened by quarrying operations. Parliament desired to save the beauty of the Hills. But the quarry owners had vested rights of quarrying which they claimed should not be taken away without compensation. There seems to have been much negotiation in the course of the Bill through Parliament. In the result, Parliament, by sections 26 and 27 of the Act, empowered the Minister, on the application of the Malvern Conservators, to make orders prohibiting quarrying on any particular part of the Hills; but the conservators had to pay compensation to the owners affected. This obligation to pay compensation would have a restrictive effect on attempts to preserve the Hills. The conservators might not be able to afford to buy out some quarry owners such as the Pyx Granite Company. Negotiations therefore took place between the company, the Malvern Conservators, and the Malvern Council, as a result of which "heads of agreement" were drawn up, under which the company were to give up their right to quarry many acres of land over which they held a licence, and were to limit their rights of quarrying to 23 acres of licensed land. (This was outside their freehold property which was not affected by the Act.) The heads of agreement were confirmed and made binding by section 54 of the Act, which provided that: "For the protection of the Pyx Granite Company Limited . . . the following provisions shall unless otherwise agreed in writing between the company and the Conservators and the Malvern Council have effect (that is to say):— The heads of agreement as set forth in the Fourth Schedule to this Act are hereby confirmed and made binding on the company and the Conservators and the Malvern Council and the provisions of this Act shall only apply to or affect the undertaking property or rights of the company subject to the provisions of the said heads of agreement." The heads of agreement contemplated that a formal agreement should be executed; and after some differences (which were only resolved after a decision of the Court of Appeal on June 24, 1925) a deed was executed on

December 14, 1925, by the Malvern Council, the Malvern Conservators and the company. By this deed the company agreed not to quarry in any part of the Malvern Hills except their freehold property, and the quarryable areas there defined; and it was agreed that the company's rights to quarry stone on their freehold property were not to be prejudiced or affected by the deed.

The upshot of it all was that by agreement the company gave up their right to quarry on a considerable area of land in return for a promise by the Malvern Conservators and the Malvern Council that the rights of the company to quarry stone on their freehold property and on some 23 acres of licensed land should be left undisturbed. This amounted, I think, to an implied agreement *by the Malvern Conservators and the Malvern Council* authorizing the company to quarry stone within those limits. But was this authorized *by the Act?* The company say that it was authorized by virtue of section 54. The Minister disputes it.

This is a difficult question, and I can well understand the approach of the judge to it. Seeing that the heads of agreement were " confirmed and made binding " by the Act, it looks as if the provisions thereof (express or implied) were authorized by the Act. But we were referred to a case which was not cited to the judge and which throws a different light on the problem. It is *Reg.* v. *Midland Railway Co.*[5] and the speech of Lord Cairns in *Caledonian Railway Co.* v. *Greenock and Wemyss Bay Railway Co.*,[6] which was quoted in it. That case shows that there are two ways in which Parliament can give validity to the provisions of an agreement not yet formally completed. It can make the provisions *as binding as a contract*, simply dispensing with the execution by the parties; or it can make the provisions *as binding as a statute*, giving them the same force as if enacted in the statute itself. What has Parliament done here? It seems to me that section 54 does no more than make the heads of agreement as binding as a contract.

At that time the heads of agreement had not been executed by the parties, but they were nevertheless " confirmed and made " binding " on the parties, who could " otherwise agree " in writing. That is typical of a contractual bond. The section goes on to say that the provisions of the Act are only to apply to the company's undertaking " subject to the provisions of the said " heads of agreement." That is no more than saying that the provisions are to be regarded as a " contracting out " of the Act

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[5] (1887) 19 Q.B.D. 540.

[6] (1874) L.R. 2 Sc. & Div. 347, 348.

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with the sanction of Parliament. The last paragraph of the heads of agreement contemplated that a formal agreement should be prepared and executed by the parties. This was done on December 14, 1925, by a deed which thenceforward replaced the heads of agreement. In these circumstances, I think the provisions of the heads of agreement cannot be regarded as equal to a statute, or as carrying the authority of Parliament, but only as of contractual force. The development of these quarryable areas was authorized by the agreement, but not by the Act of Parliament. It does not come, therefore, within the general development order, but needs the special permission of the local planning authority, or the Minister.

This is not the end of the case, because the company long ago took steps to safeguard their position. On November 17, 1947 (while the earlier Planning Acts were in force), they applied to the Malvern Council for permission to develop the land for quarrying purposes. On January 14, 1948, the Minister "called "in" the company's application for decision by himself in so far as it concerned the winning and working of minerals by surface working. When the Act of 1947 came into operation, the company's application was, by the statute, to be treated as if it was made under that Act. A local inquiry was held. By the letters of September 5, 1949, and September 30, 1953 (to which I have already referred) the Minister granted permission in respect of part of the land, but imposed conditions to which the company object. The conditions required that the company should take away their plant and machinery when they had finished, and so forth. The company say that the conditions are invalid in whole or in part, and seek a declaration to that effect.

Mr. Squibb on this part of the case takes another preliminary objection. There is nothing here corresponding to section 17 on which he previously relied. But he relies on the wide discretion given by section 14 of the Act of 1947 to the planning authority to impose conditions, and says that this discretion is not open to proceedings for a declaration. He read us passages from *Barnard* v. *National Dock Labour Board*,[7] and sought to deduce therefrom that the remedy by declaration only lies where there is no jurisdiction, not where it is wrongly exercised. I do not think there is any such limit to the remedy by declaration. The wide scope of it can be seen from the speech of Viscount Kilmuir L.C. in *Vine* v. *National Dock Labour Board*,[8] from which it appears that if a substantial question exists which one person has a real interest to raise, and the other to oppose, then the court has a discretion to resolve it by a declaration, which it will exercise if there is good reason for so doing.

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[7] [1953] 2 Q.B. 18; [1953] 1 All E.R. 1113.

[8] [1957] A.C. 488, 498; [1956] 3 All E.R. 939.

Mr. Squibb also said that if the conditions are invalid, the only remedy is by certiorari, and not by declaration, thus implicitly admitting that there ought to be a remedy, but that the company had pursued the wrong form of it. I think it is probable that certiorari would lie to quash, but I can see an argument to the contrary. It can be said that certiorari is confined to judicial acts; and it can be argued that the Minister, when granting planning permission, is not acting judicially, but administratively, and that his decision is, therefore, not subject to certiorari. Mr. Squibb said that it is sufficiently near a judicial decision to be the subject of certiorari, and referred us to *Rex* v. *Hendon Urban District Council, Ex parte Chorley.*[9] He is probably right about this; but I would not like to be dogmatic about it, because since that case there have been the decisions of the Privy Council in *Nakkuda Ali* v. *M. F. De S. Jayaratne*[10] and of the Divisional Court in *Reg.* v. *Metropolitan Police Commissioner, Ex parte Parker*,[11] which may be said to have restricted the scope of this remedy, though I hope not.

It is one of the defects of certiorari that it so often involves an inquiry into the distinction between judicial acts and administrative acts which no one has been able satisfactorily to define. No such difficulty arises with the remedy by declaration, which is wide enough to meet this deficiency, as this court had occasion to point out in *Reg.* v. *Staff Sub-Committee of London County Council's Education Committee, Ex parte Schonfeld* (*Practice Note*),[12] which was not reported on this point. It applies to administrative acts as well as judicial acts whenever their validity is challenged because of a denial of justice, or for other good reason. It is clearly available to enable the court to declare whether conditions imposed by a licensing authority are valid, no matter whether that authority is acting judicially or administratively: see *Associated Provincial Picture Houses* v. *Wednesbury Corporation.*[13]

There are very good reasons here for entertaining a claim for

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[9] [1933] 2 K.B. 696; 49 T.L.R. 482.

[10] [1951] A.C. 66, 73; 66 T.L.R. (Pt. 2) 214.

[11] [1953] 1 W.L.R. 1150; [1953] 2 All E.R. 717.

[12] [1956] 1 W.L.R. 430; [1956] 1 All E.R. 753n. (C.A. Feb. 28, 1956).

[13] [1948] 1 K.B. 223; 63 T.L.R. 623; [1947] 2 All E.R. 680.

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a declaration. If these conditions are valid, they operate as a land charge, and must be entered in the register of land charges. It may be very important for the owner, or any proposed purchaser, to know whether they are valid or not before he commits himself to the proposed development. No statutory remedy is available for the purpose, and the best, if not the only, remedy is by way of a declaration. In my opinion, therefore, this preliminary objection also fails.

This brings me to the question whether the conditions imposed in this case are valid or not. The particular conditions to which the company object are those concerned with the plant and machinery which has been used in the quarries for years—not for actually winning the stone and getting it out of the ground, but for crushing it and putting it into a marketable state. The company say that they do not need permission to use this plant and machinery because they are using it in the same way as it was used before 1947. Yet the Minister has imposed conditions such as these: (1) He requires that crushing and screening shall only be operated between such hours as may be agreed, and that steps shall be taken to control the emission of dust therefrom. (2) He requires that all plant, machinery and foundations shall be removed when they are no longer required, and the site left in a tidy condition.

The Minister claims to impose these conditions under the general power contained in section 14 (1), or alternatively under the special power contained in section 14 (2) (*a*). The company say that if the Minister wishes to impose such conditions, he can only do it under the powers contained in section 26 which give a right to compensation under section 27.

The principles to be applied are not, I think, in doubt. Although the planning authorities are given very wide powers to impose " such conditions as they think fit," nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest. If they mistake or misuse their powers, however bona fide, the court can interfere by declaration and injunction: see *Sydney Municipal Council* v. *Campbell*,[14] *Roberts* v. *Hopwood*[15] and *Smith* v. *East Elloe Rural District Council*.[16]

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[14] [1925] A.C. 338, 343.

[15] [1925] A.C. 578, 613; 41 T.L.R. 436.

[16] [1956] A.C. 736, 762, 763; [1956] 1 All E.R. 855.

This principle was applied in a planning case where the London County Council gave permission for some manufacturers to erect a new factory on a new site, but sought to impose a condition that their existing works on the old site should close down as soon as the new factory was brought into use. This condition was desirable in the interests of the over-all planning of the area. But the Minister was advised (rightly, I think) that the condition could not properly be imposed as it was, in part, an attempt to suppress existing development by depriving the manufacturers of the right to use their existing factory; and that suppression of an existing use of this kind could only be achieved by an order under section 26[17]: see the Bulletin of Selected Appeal Decisions (VII/12). The Pyx Granite Company say that the conditions to which they object here are invalid for a similar reason, namely, as an attempt to impose conditions on the continuance of an existing use which can only be achieved by an order under section 26.

The judge thought that the company were right on this point, and it is only after much hesitation that I differ from him. I cannot shut my eyes to the fact that this plant and machinery is ancillary to the getting of stone from the quarries. The company win the stone from the working face, and for that operation they certainly have to get permission. Then they crush the stone and screen it, not actually at the place where they are excavating, but very near to it. If the question depended on the general words of section 14 (1) there might be a doubt whether the conditions were valid; but the special words of section 14 (2) were inserted so as to clear up any doubts about section 14 (1), and they seem to me to cover this case. These conditions require "the carrying "out of works" on land under the control of the company—although it is not the land in respect of which the application for permission relates—and they can properly be regarded as expedient "in connexion with" the permitted development.

I see no reason to attribute to the Minister any ulterior object. He evidently takes the view that if the company wish to win and work stone from these quarries for some years to come, they should take steps to ensure that there is as little nuisance as possible either from the blasting operations or from the ancillary operations of crushing and screening the stone; and they should clear up the place when they have finished. There is nothing unfair or unreasonable about that. After all, if the company do not wish to accept the permission on those conditions, their remedy is not to work the quarry. But if they do continue to work the quarry, they can fairly be expected to comply with these conditions. It would be very different if the Minister sought to impose like conditions about plant or machinery a mile or so away. It might well be that that could only be done by an order under section 26. But here the plant and machinery are on the spot, and the conditions are so closely " in connexion with " the permitted development as to be valid. In my opinion, therefore, although there is no technical barrier to the granting of declarations, the company have not succeeded in establishing a case for them. I would allow the appeal accordingly.

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[17] Hill's Complete Law of Town and Country Planning (4th ed.), 2nd Cumulative Supplement, pp. 489–490.

Hodson L.J. The first question is whether or not the court can grant the declaration first made by the judge. Section 17 (1) of the Town and Country Planning Act, 1947, provides statutory proceedings for the determination of any question whether the carrying out of certain operations on land would constitute or involve development within the meaning of the Act for which, having regard to the provisions of any development order, permission is required to be obtained by application. A person who proposes to carry out operations *may*, in the words of the section, " either as part of an application for such permission, or without " any such application, apply to the local planning authority to " determine that question."

The effect of section 17 (2) read with its prior provisions section 15 (1) (2) and (3) is that any decision of the Minister given on an application made under section 17 (1) to determine the above question is final, save and except that provision is made for appeal against an order made for the enforcement of planning control.

In these circumstances, the principles laid down in *Barraclough* v. *Brown*[18] are, in my judgment, applicable. The headnote of this case reads as follows: " Where a statute gives a right " to recover expenses in a court of summary jurisdiction from a " person who is not otherwise liable, there is no right to come to " the High Court for a declaration that the applicant has a right " to recover the expenses in a court of summary jurisdiction; he " can only take proceedings in the latter court." Lord Herschell said[19]: " It would be very mischievous to hold that when a party " is compelled by statute to resort to an inferior court he can " come first to the High Court to have his right . . . determined."

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[18] [1897] A.C. 615.

[19] Ibid. 620.

Lord Watson said[20]: "It cannot be the duty of any court to "pronounce an order when it plainly appears that, in so doing, "the court would be using a jurisdiction which the legislature "has forbidden it to exercise."

The judge disposed of this objection by reference to the date of the original application to the Minister, which was prior to the date of the coming into force of the Act of 1947, videlicet, 1948; but the material matter to be considered is this action for a declaration which was commenced by writ in December, 1954, and the jurisdiction of the court to grant a declaration must be considered independently of whether any application has or has not been made to the local planning authority under section 17.

The position of the court is the same, whether or not the local planning authority or the Minister has made a determination. Planning is itself the creature of statute, and Parliament has provided its own method for the determination of the question here involved, videlicet, whether planning permission is required. No significance is to be attached to the use of the word "may," which is the only word apt for the purpose. Indeed, it would not be sensible to make it compulsory for persons to seek a determination if they did not consider it in their interest to do so. The same permissive word "may" is contained in the statute under consideration in *Barraclough* v. *Brown*, supra.

Although the section now in question is directed to a different purpose from that involved in that case, there is to my mind no distinction in principle. The declaration sought must look to the future just as the determination to be sought under section 17, and I can see no good ground for distinguishing this case on the ground that the declaration speaks in the present tense. It is said, further, by the plaintiffs that it is inconvenient as between vendor and purchaser not to know whether there was an enforcement notice, and that therefore it is in practice highly desirable to be able to obtain a declaration of this nature; but I do not find that this argument carries the matter any further. The risk of planning interference by the Minister cannot be avoided, and a safeguard is provided by section 17 itself. In my opinion, the legislature has by section 17 given exclusive jurisdiction to the local authority and the Minister, and this court cannot be asked to make the declaration sought.

If I am wrong as to this, the question is whether the appellants are entitled to succeed upon the ground that the respondents were not authorized by the Malvern Hills Act, 1924, to develop their land for the purpose of winning and working of minerals by surface working in their quarries. The respondents rely on the words of clause XII of the First Schedule to the Town and Country Planning (General Development) Order, 1948, made pursuant to the Act of 1947, revoked and replaced by the Town and Country Planning General Development Order, etc., 1950, which contains, so far as material, an identical schedule of permitted development. Class XII contains this: "Development "authorized by any local or private Act of Parliament or by any "Order approved by both Houses of Parliament, being an Act "or Order which designates specifically both the nature of the "development thereby authorized and the land upon which it "may be carried out." The sole question is whether there has been such an authorization.

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[20] [1897] A.C. 615, 622.

It is to be observed, first, that the respondents required no statutory authority to work their undertaking. Secondly, the Malvern Hills Act, 1924, as its preamble shows, was an Act framed to preserve the amenities of the Malvern Hills, and to deal with the interference with those amenities by quarrying operations, and by the erection of buildings, sheds, machinery, and plant. By sections 25, 26 and 27 of the Act the conservators might make and enforce bye-laws to regulate quarrying in, upon or under the Malvern Hills, and regulate the erection of buildings, etc., and the Minister of Agriculture and Fisheries might make orders for the prohibition of quarrying. Sections 28, 29 and 30 deal with procedure and enforcement of orders of the Minister.

[His Lordship read section 54 of the Act of 1924, and continued:] The heads of agreement are set out in the Fourth Schedule and contain the following paragraph: "A clause to be "inserted in the Bill excluding the undertaking property and "rights of the company from its operation except that bye-laws "may be made with the approval of the Home Secretary (after "notice to the company) in regard only to blasting operations in "the company's quarries for the protection of the public."

No such clause was ever inserted, and in 1925 it was held by the Court of Appeal that, the legislature not having seen fit to insert this clause in the Act when it became law, the court could not, by a process of construction, produce the same result, so that the undertaking of the respondents remained subject to the powers conferred on the conservators of making bye-laws for the regulation of quarrying in the area subject to their jurisdiction. Thus the Act of 1924 did not exclude the respondents' land from its operation.

There is nothing in the Act which specifically authorizes the respondents to carry on their quarrying or any other activities, but it is argued that by countenancing these activities there has been an authorization within the meaning of class XII of the First Schedule to the Development Orders to which I have referred.

The provisions of the Act are restrictive, and there is nothing in the agreement which is part of the Act except a variation of the rights of the parties to the agreement not amounting in any sense to the giving to the respondents of any new authority to work. Statutory confirmation of the agreement does not put the parties in a different position from that which they would have occupied if they had made an agreement which had not been so confirmed. Rights conferred by agreement are none the less conferred thereby when the agreement is confirmed by Act of Parliament. Authorization involves the need for sanction, as is illustrated by section 22 of the Act of 1924 and the Second and Third Schedules thereto, where the conservators are specifically authorized to purchase quarries, etc., notwithstanding anything contained in certain earlier Acts.

This construction of the Act of 1924 as not in itself authorizing the respondents to do anything is, in my opinion, supported by the judgment of the Court of Crown Cases Reserved in *Reg.* v. *Midland Railway Co.*,[21] which was not referred to in the court below. The question there was whether, under section 8 of the Regulation of Railways Act, 1873, a difference between railway companies was, under the provisions of any general or special Act, required or authorized to be referred to arbitration. Two railway companies had agreed that all questions of difference arising out of their agreement should be determined by arbitration in manner provided by the Railway Companies Arbitration Act, 1859, and a private Act was subsequently passed to which the agreement was scheduled, and by which it was provided that the scheduled agreement should be confirmed and made binding. It was held that the right to refer to arbitration was derived from the agreement, and that the difference was not "required or "authorized to be referred to arbitration under the provisions of "any general or special Act" within the meaning of section 8. In other words, the recognition of the agreement was not an authorization to refer to arbitration.

The same situation exists here. The respondents were not authorized by the Act of 1924 to do anything, and the fact that their agreement with other parties has been embodied in an Act of Parliament does not amount to authorization. There is nothing here to correspond with the words in *Caledonian Railway Co.* v. *Greenock and Wemyss Bay Railway Co.*,[22] referred to in the judgment of Stephen J.,[23] where the clause to be construed, after stating that the agreement was valid and obligatory, went on to provide that "the companies are hereby required to implement "and fulfil all the provisions and stipulations thereof."

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[21] 19 Q.B.D. 540.

The judgment of Wills J.,[24] in the case cited, begins as follows: "Broadly stated, and apart from technicality, the "question is whether in a case where an agreement between two "companies to which the Act of 1873 refers, containing a "reference clause, has been embodied in an Act of Parliament, "the necessity or the privilege, as the case may be, of having "their disputes referred to arbitration has been created by the "express command of the legislature, or is the offspring of "agreement between the parties, the action of Parliament "having been confined to the removal of obstacles, actual or "apprehended, to their power so to contract."

Wills J. answered the question by saying that the reference clause was the offspring of the agreement between the parties. The view of the court was clearly that the requisition or authority then in question was a requisition to do that which the companies were not called on to do otherwise, and an authority to do that which they were not authorized to do without the Act. In my judgment, the appellants are right in their submission that the respondents were not authorized within the meaning of the General Development Order.

It is also to be noticed that the Tank Quarry, part of the respondents' undertaking, was not, so far as the Schedule to the Act of 1924 and the plan annexed thereto shows, part of the Malvern Hills area, unless it can be said that the conservators have acquired an interest in it within the meaning of section 5 of the Act. There is, so far as I know, no evidence of this, but it is not necessary to pursue this matter in view of the fact that the North Quarry is within the Malvern Hills area, and included in the Schedules to the Act.

The only remaining question is as to the conditions imposed by the Minister. I have nothing to add on this subject to the views expressed by my Lord as to the validity of the conditions generally. In any event it would, I think, be impossible to mutilate the Minister's decision by removing one or more of the conditions. The permission given has been given subject to those conditions, and non constat but that no permission would have been given at all if the conditions had not been attached. The consequence would be that if any of the conditions imposed were held to be bad as imposed without jurisdiction, the whole planning permission would fall with it, and the respondents would be left without any planning permission at all, for it would not be open to the court to leave the planning permission standing shorn of its conditions, or any of them.

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[22] L.R. 2 Sc. & Div. 347.

[23] 19 Q.B.D. 546–547.

[24] Ibid. 549.

Moreover it is doubtful whether at this time the Minister's decision could properly be impeached by declaration. That could have been done by certiorari (see *Rex* v. *Hendon Rural District Council, Ex parte Chorley*[25]), but the time for this has long since passed. Such proceedings, if successful, could only, in my opinion, have led to the result I have indicated, namely, the quashing of the whole permission, and not the leaving of the permission standing shorn of all or some of its conditions. I would allow the appeal.

MORRIS L.J. When the company made application on November 17, 1947, for permission to develop their land with quarrying undertakings thereon, the Town and Country Planning Act, 1947, had been passed, but most of its provisions had not come into force. The provisions of the Town and Country Planning, England and Wales Interim Development Order (S.R. & O., 1946, No. 1621) were then in operation. That order was made under the Town and Country Planning Acts, 1932 to 1944. It was provided by section 10 of the Town and Country Planning Act, 1932, that the Minister should make a general order with respect to the interim development of land within the areas to which resolutions to prepare or adopt a scheme applied.

In reference to the area now in question there had, on July 25, 1934, been a resolution to prepare a scheme. That resolution had been approved by the Minister on September 28, 1934. Interim development for the purposes of section 10 meant development between the date on which a resolution took effect and the date of coming into operation of a scheme. Under article 4 of the Order of 1946 certain development could be undertaken without the permission of the interim development authority. One such class of development included (with certain exceptions) development authorized by any Act of Parliament which specifically designated the land on which the development could be carried out. Another class (see class V) included the carrying out by mining undertakers (subject to certain exceptions) on land comprised in their undertaking of any development required for the purposes of their undertaking.

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[25] [1933] 2 K.B. 696.

The Minister in fact called in the company's application of November 17, 1947, on January 14, 1948. When he dealt with it, he did so under the provisions of the Town and Country Planning Act, 1947, which came into operation on July 1, 1948. That Act provides (see section 12) that permission is required under Part III of the Act in respect of any development of land which is carried out after the appointed day when the Act came into force. Under the Act, development is defined to mean (subject to certain exceptions) the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land. Section 13 of the Act required the Minister to provide by order for the grant of permission for the development of land under Part III of the Act, which permission, in the case of any development specified in the Order, might be granted by the Order itself, or in other cases might be granted by the local planning authority or in certain cases by the Minister.

On May 5, 1948, the Minister made the Town and Country Planning (General Development) Order, 1948. On May 8, 1950, the Minister made the Town and Country Planning General Development Order, etc., 1950. [His Lordship read article 3 (1) of the Order of 1950 and continued:] Class XII of Schedule I refers to: "Development authorized by any local or private Act "of Parliament . . . which designates specifically both the nature "of the development thereby authorized and the land upon which "it may be carried out."

If the development referred to by the company in their letter of November 17, 1947, comes within the words which I have just cited, then the company had permission for such development, and no further permission of the local planning authority or of the Minister was needed. When, at a much later date, that is, in July, 1952, an inquiry was being held, the company put forward their submission that they need not have applied for planning permission. They invited a dismissal of their application by the Minister on the ground that no further permission was required.

It may seem unfortunate that steps could not then have been taken to obtain the ruling of the court so that the uncertainty could then be resolved, and further unnecessary labour and inquiry avoided. Recourse to the courts was not, however, then sought, and the main question now to be determined is whether the company were permitted to do what they proposed without obtaining any special permission. Whether the provisions of the Order of 1946, or of 1948, or of 1950, are regarded, the principal issue is whether the development proposed by the company is development that was authorized by the Malvern Hills Act, 1924. It seems to me that the Malvern Hills Act, 1924, designated both the nature of the development to be carried out by the company and the land on which the development was to be carried out. The question is, therefore, whether that Act authorized the quarrying activities of the company.

The recitals in the preamble to the Malvern Hills Act, 1924, show that there was great concern to preserve the beauties of the Malvern Hills, and to limit the interference with the amenities of the area which must result from quarrying operations and the erection of buildings, sheds, machinery and plant. The company was an existing company engaged in the business of quarrying stone. The company was clearly interested, and the company opposed the Bill when it was introduced. There were certain manifest conflicts. On the one hand there was a desire to maintain natural beauty; on the other hand there was a necessity to obtain a certain output of stone. Those owning lands which contained valuable stone had an interest to develop their property commercially. Such interest might, if uncontrolled, run counter to the public interest of preserving the amenities of the Malvern Hills "for purposes of health recreation and enjoyment and the prosperity and development of the district."

After negotiation, agreement was reached between the company and the promoters of the Bill. The settlement that was reached involved that the company should continue to quarry on their freehold land, should abandon their rights in regard to a certain area, and, while retaining existing rights on a part of the North Quarry area, should have transferred to them additional rights relating to other parts in the North Quarry area. The arrangements recorded in the Fourth Schedule to the Act of 1924 were most detailed. There was a plan which was signed by the Chairman of the Committee of the House of Lords to whom the Bill was referred. The first paragraph of the agreement set out in the Fourth Schedule recorded: "The company's rights of "quarrying to be limited (outside their freehold property) to the "quarryable area at North Malvern defined on a plan to be

" signed by the Right Honourable the Lord Islington the Chair- " man of the Committee of the House of Lords to whom the Bill " is referred a copy of which is to be supplied by the conservators " to the company." The plan which was signed showed: (a) the company's freehold property; (b) other areas of the hill land on which the company were to quarry; (c) an area in reference to which the company had a lease, but in which they agreed to relinquish their quarrying rights. The effect of the agreement was that there was a limitation of the area which would be subject to quarrying by the company.

The heads of agreement provided, by clause 18, that the provisions were to be inserted in an agreement. An agreement was entered into on December 14, 1925. Before that date there was litigation between the company and the conservators and the Malvern Urban District Council, which resulted in judgments in this court on June 24, 1925.[26] The principal issue in the litigation concerned the meaning and effect of clause 14 of the heads of agreement. It was held that that clause contained a transitory provision having no force or effect when the bill became an Act. It would appear from the judgment of Warrington L.J. that one of the chief matters in controversy was whether bye-laws would bind the company. Warrington L.J. said[26]: " The sub- " stantial point to be decided is whether, on the true construction " of the Malvern Hills Act, 1924, the undertaking, property and " rights of the plaintiffs are or are not subject to the powers by " the Act conferred on the conservators of making byelaws for " the regulation of quarrying in the area subject to their jurisdic- " tion." It was held that the company would be so subject, though it may be noted that when later the agreement of December 14 was actually made, it was provided by paragraph 4 (*b*) as follows: " No byelaw made by the conservators under section 25 " of the Act shall affect the company's quarries except such as " may be made with the approval of the Home Secretary (after " notice to the company) in regard only to blasting operations in " the company's quarries for the protection of the public."

Section 22 of the Act of 1924 gave certain powers to the conservators to purchase certain lands, property and quarries described in the Second and Third Schedules to the Act. Those schedules included what are known as the " Foley Quarries." The interests which the Malvern Council were to transfer to the company so as to give additional quarries to the company related to the Foley Quarries. The agreement recorded in the Fourth

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[26] Unreported, C.A. June 24, 1925.

Schedule gave to the conservators an option to purchase the company's undertaking as a going concern at the expiration of two years after written notice of intention should have been given to the company during the third, fourth or fifth year after the passing of the Bill.

It would have seemed strange if, after an agreement under which additional quarrying rights were secured to the company subject always to a provision that the conservators might exercise an option to purchase the whole undertaking, the conservators should have a general power given them by the Act to purchase quarries which would include the Foley Quarries. Section 54 of the Act gave "protection" to the company, and it was enacted that "the provisions of this Act shall only apply to or affect "the undertaking property or rights of the company subject to "the provisions of the said heads of agreement."

It was held in this court that section 22 of the Act was superseded by the special provisions of clauses 12 and 13 of the heads of agreement. Warrington L.J. said[26]: "Section 22 "contains a general power for the conservators to take certain "quarries including the Foley Quarries. The heads of agreement "by clauses 12 and 13 provide specially that the conservators "shall have the option to purchase at a certain time and on "certain terms the entire undertaking of the company. The "general provision of section 22 is superseded by the special "provisions of clauses 12 and 13."

Atkin L.J. concluded his judgment with the words: "I agree "that the special provisions in the rest of the heads of agreement "override the more general provisions of the statute, and that "the plaintiffs are entitled to the first declaration based upon "paragraphs 12 and 13 of the heads of agreement." The reference was, I think, to a declaration made by Romer J. in reference to one of the questions raised, which was propounded as follows[27]: "Whether notwithstanding the provisions of section "54 of the Act and clauses 3, 12 and 13 of the Fourth Schedule, "the conservators are at present entitled to acquire the Council's "interest in the Foley Quarries under the provisions of section 22 "of the Act."

Romer J. had further decided that, pending any acquisition by the conservators of the company's undertaking as a going concern under clause 12 of the Fourth Schedule, the rights and interests of the company in the Gandolfi licences and in the Foley Quarries were not subject to the jurisdiction of the conservators under the provisions of sections 25 to 31 of the Act of 1924. That part of the decision of Romer J. was reversed in this court. It would appear that in this court there was some concentration on the applicability of section 25, which dealt with the power of making byelaws.

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[26] Unreported, C.A. June 24, 1925. [27] Ibid.

It does not seem to me to be wholly clear whether it was being decided that the powers under section 26 of the Act of 1924 could be exercised in reference to the quarrying areas defined in the Fourth Schedule. Section 26 of the Act gives power to the appropriate Minister, on the application of the conservators, to make orders prohibiting quarrying on any specified part of the Malvern Hills; any such order would be subject to a provision for the payment of compensation.

In view of the terms of section 54 that the provisions of the Act only apply to or affect the company subject to the provisions of the heads of agreement, and in view of the fact that the Fourth Schedule records detailed agreed arrangements in regard to the company's rights of quarrying, and in view of the fact that the company were being given "protection," it might seem strange if the conservators had power to apply for an order which would prohibit the company from quarrying. The words of Atkin L.J.,[28] to which I have referred, and in particular the words "the special "provisions in the rest of the heads of agreement override the "more general provisions of the statute" might suggest that sections 26 and 27 were not applicable to the undertaking, property or rights of the company.

It is not, however, in my judgment necessary to consider this particular matter further, for the issue now arising is really whether the activities of the company were "authorized" by the Act of 1924. That Act was one which effected most carefully worked out planning in regard to the Malvern Hills. The conservators were given additional powers. The company agreed to a limitation and fixation of their rights. From their previously existing rights something was extracted, and to them something else was added. The company's rights were limited, outside their freehold property, to a defined quarryable area. It was implicit in the agreement made that the continuing rights of the company to quarry on their freehold area were recognized. The company were to supply the Council with stone for the repair of roads. The company were to put in repair a quarry road between certain defined points, and were to keep such road in repair. The company were to widen the quarry road to permit of a footpath by the side of it. The company were to be at liberty to make and use a tunnel under the area of land dividing their freehold property from the quarries which the council were handing over to the company. All this elaborately worked out detailed planning was, in my judgment, formally approved by Parliament when it provided by section 54 that, for the "protection" of the company, the Act should only apply to or affect the undertaking, property or rights of the company subject to the provisions of the heads of agreement. It seems to me that formal approval and sanction were given by Parliament to the activities of the company as planned and arranged within the scope of the agreement that was made. In this way the activities of the company which constituted "development" were, in a very real sense, "authorized" by the Act of 1924. Parliament enacted that the specific arrangements (under which the range of the company's activities was defined and limited) were confirmed and made binding on the company, the conservators and the Malvern Council. I feel impelled to the view that Parliament authorized the arrangements which it confirmed and made binding.

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[28] Unreported, C.A. June 24, 1925.

It was submitted that the decision in *Reg.* v. *Midland Railway Co.*[29] negatived the view that in the present case development was "authorized" by the Malvern Hills Act, 1924. In that case an agreement had been entered into between the Midland Railway Company and two companies, the Great Western and the West Midland Railway Companies, which two companies were to be amalgamated. At a later date, by the Act of Parliament which effected the amalgamation, the previous agreement was "confirmed and made binding upon" the Midland and Great Western Railway Companies. The agreement had contained an arbitration provision. It was held that differences which later arose were not differences which "under the "provisions of any general or special Act" were "required or "authorized to be referred to arbitration."

In that case, the agreement between the Midland Railway Company and the two other companies (who, for the purposes of the agreement, were to be considered as one company) was entered into on March 17, 1863; there were, under the agreement, various provisions for through rates and charges, and for through bookings, and for mutual interchange of traffic, and there was the provision for a reference to arbitration in manner provided by the Railway Companies Arbitration Act, 1859, of all disputed questions as to fares, rates and charges, and of other questions of difference arising out of the agreement. Later the Great Western Railway (West Midland Amalgamation) Act, 1863 (26 & 27 Vict. c. 113), amalgamated the Great Western and West Midland Companies. That Act was passed on July 13, 1863. By section 63, the agreement of March 17, 1863, was "confirmed "and made binding upon" the Midland and Great Western Railway Companies.

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[29] 19 Q.B.D. 540.

The Regulation of Railways Act, 1873, provided by section 8 for a reference to the Railway Commissioners of differences which, under the provisions of any general or special Act, were "required or authorized to be referred to arbitration." Certain differences arose. The Midland Railway wanted the differences referred to the Railway Commissioners, and relied on section 8 of the Act of 1873; they said that under the provisions of the Act of 1863, which was passed on July 13, 1863, the differences were "required or authorized to be referred to arbitration." The Great Western Railway wanted the differences settled under the machinery of the Arbitration Act, 1859, as the parties had provided for in their agreement made on March 17, 1863; they said that though that agreement had been "confirmed and made "binding upon" the Midland and Great Western Companies by the Act passed on July 13, 1863, that did not alter the fact that the companies had, by their agreement of March 17, chosen a particular form of reference, and accordingly that the differences were not such as "under the provisions" of the Act of 1863 were "required or authorized" to be referred to arbitration. The agreement between the parties which provided for arbitration was made four months before the Act was passed, and began on July 1, 1863. The Great Western Company succeeded. In examining the meaning of section 8 of the Act of 1873, Stephen J. said [30]: "It seems to me that its object is to enable the Railway "Commissioners to have questions referred to them for their "decision where the arbitration rests upon the authority of "parliament, where there is some special authority of parlia"ment which requires or authorizes it; that is to say, cases in "which the railway companies could not by their own manner of "constitution and according to their own independent powers, do "the thing for themselves." The parties had, however, done it for themselves by their agreement of March 17. Wills J. said [31]: "If it was substantially the action of Parliament and the will of "the legislature which imposed on the parties the necessity, or

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[30] 19 Q.B.D. 540, 545.

[31] Ibid. 549.

" conferred on them the right, to go to arbitration, then Parlia-" ment may change the forum, and has elected so to do."

In the present case we are not concerned with the phrase " required or authorized," but only with the word " authorized." The word " authorized " appears in a great many statutory provisions. It does not mean the same as " required." Its meaning in any particular case must, I think, be deduced from the context, and must depend on the context. In some instances, statutes are merely permissive: see *Simpson* v. *Attorney-General*,[32] where a person was authorized and empowered to improve the passage for boats on a river. When the Trustee Act, 1925, refers to " authorized investments," that phrase means (see section 68) investments authorized by the instrument (if any) creating the trust for the investment of money subject to the trust, or by law. When the Moneylenders Act, 1927, refers to an " authorized name " or " authorized address," those expressions respectively mean (see section 15) the name under which and the address at which a moneylender is authorized by a certificate granted under the Act to carry on his business as a moneylender. In *Evans* v. *E. Hulton & Co. Ltd.*[33] Tomlin J. pointed to the applicability of the dictionary definition of " to authorize," that is, " to give formal approval to, to " sanction, approve, countenance."

The word " authorized " must, therefore, be considered in its context and in its setting. I cannot think that in its context in planning regulations it need be limited to rights newly conferred by an Act of Parliament. I consider that it extends also to rights recognized and sanctioned by an Act of Parliament.

It is to be observed that section 35 of the Town and Country Planning Act, 1932 (following section 16 of the Town Planning Act, 1925), refers to an " authorized association," and by section 35 (1) an authorized association is defined to mean a society, company or body of persons with certain specified objects, and which satisfies certain conditions, and which is " approved " by the Minister.

In the context now being considered, it seems to me that the development which is referred to is development which Parliament has had under consideration, and has, in the case of operations which have not been begun, conferred a right to undertake them, or in the case of some operations already begun has recognized and sanctioned and approved their continuance. Parliament might, for example, do so by giving some exemption or protection from the application to them of certain provisions which Parliament is then enacting. Though, as mentioned hereafter, certain overriding powers are reserved to the Minister or the local planning authority, it would seem reasonable that, subject to the exercise of those powers, there should be no need for further permission in the case of some development operations which constitute a carefully adjusted piece of planning, and which, having come under the consideration of Parliament, have received express recognition.

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[32] [1904] A.C. 476; 20 T.L.R. 761.

[33] (1924) 131 L.T. 534, 535.

At the time of the passing of the Malvern Hills Act, 1924, the company had certain existing rights in reference to its freehold land; it also had rights under licences. When the conservators were asking for extended powers, they were opposed by the company. The company might have defeated the Bill. But a settlement was reached, and terms of agreement settled; those terms only became effective and operative when the Act was passed. The company was given "protection." It gave up some rights in the interests of good planning; it received new rights. The Act was only to apply to the company subject to the agreement.

In my judgment, applying the above-quoted language of Wills J., it was [34] "the action of Parliament and the will of the "legislature" which conferred protection on the company, which protection recognized their existing rights in reference to their freehold property, and governed and defined their other rights. In my judgment, Parliament decreed a settlement which took into account public interest on the one hand, and private interests on the other. Though that settlement was negotiated by those concerned, Parliament then sanctioned it and countenanced it. As a piece of planning, in my judgment, they "authorized" it. I would regard the development operations of the company after the date of the passing of the Act of 1924 as having been done with the recognition, sanction and approval of Parliament, and accordingly, when planning is being considered, as having been done with the authority of Parliament.

It is to be noted that article 4 (1) of the Order of 1950 provides as follows: "If either the Minister or the local plan-"ning authority is satisfied that it is expedient that development "of any of the classes specified in the First Schedule to "this Order should not be carried out in any particular area, "or that any particular development of any of those classes "should not be carried out, unless permission is granted on

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[34] 19 Q.B.D. 540, 549.

"an application in that behalf, the Minister or the local "planning authority may direct that the permission granted by "article 3 of this Order shall not apply to:—(*a*) all or any "development of all or any of those classes in any particular area "specified in the direction, or (*b*) any particular development, "specified in the direction, falling within any of those classes; "Provided that, in the case of development of Class XII, no such "direction shall have effect in relation to development authorized "by any Act passed after the first day of July, 1948, or by any "order requiring the approval of both Houses of Parliament "approved after that date."

A direction could, therefore, have been made having the result that the company would have needed express permission to undertake development. The existence of this article (and see also article 4 of the Order of 1948) would suggest that no unduly limited or restricted meaning should be given to the word "authorized."

It is to be remembered that wide powers of control are given by section 26 of the Act of 1947; orders made under section 26 may involve the payment of compensation under section 27. Inasmuch as the company came to terms with the conservators and the Council in 1924, and gave up certain rights that they had on the stated and recognized basis that they were continuing their rights of quarrying on their freehold land, and were being given "protection," it would seem to me to be a very unsatisfactory result if, without receiving compensation, they must cease operations in a few years' time. If new planning considerations and new policy demand some altered arrangements, it would seem but fair that they should be achieved by the exercise of powers that would entail the payment of compensation.

The appellants submit that the company are not entitled to apply to the court for a declaration. They submit that the only right which the company had was to make an application to the planning authority under section 17 of the Act of 1947. In my judgment, the wording of section 17 denotes that an option is given to seek a determination by the use of the procedure of the section, but that the right which is given is not to the exclusion of any other rights. I do not consider that there is any withdrawal or negation of the right to come to the court for a declaration.

In *Barraclough* v. *Brown*[35] certain rights were by statute given to undertakers of navigation. If a boat was sunk in the

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[35] [1897] A.C. 615, 616.

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Morris L.J.

river, the undertakers were given power to follow various courses. One of such courses was expressed in the words: "or the under-"takers may, if they think fit, recover such expenses from the "owner of such boat, barge, or vessel in a court of summary "jurisdiction." If the undertakers adopted that course, they could only recover the expenses in a court of summary jurisdiction, and not by bringing an action in the High Court. The defendants, who were sued in the High Court, were under no liability to pay the expenses at common law; the liability, if it existed, was created by the words of the statute as quoted above. As Lord Herschell said[36]: "I do not think the appellant can "claim to recover by virtue of the statute, and at the same time "insist upon doing so by means other than those prescribed by "the statute which alone confers the right." Nor, if he was compelled by statute to go to the court of summary jurisdiction, could he go first to the High Court to ask for a declaration that he could recover, for that was the very matter relegated to the inferior court. The High Court could not deal with a matter which the legislature, by plain implication, had enacted should be exclusively committed to the summary court. In my judgment, there is no language in the Act of 1947 which debars the company from seeking the ruling of the High Court.

Though it is with diffidence that I arrive at a conclusion differing from my Lords, I consider that the judge was right in making the first declaration, and the first part of the second declaration. On this view, the questions which were argued in regard to the conditions and the right of the plaintiff company to seek a declaration as to them do not arise; but if I had shared the view that they do arise, I would have expressed my concurrence with the conclusions reached by Lord Denning. For the reasons which I have given, I would have dismissed the appeal.

Appeal allowed.
Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor, Ministry of Health and Ministry of Housing and Local Government; Sharpe, Pritchard & Co. for W. R. Scurfield, Worcestershire County Council; Stephenson, Harwood & Tatham.*

M. M. H.

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[36] [1897] A.C. 615, 620.

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